SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966

No. 36

HUBERT L. WILL, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 29, 1966
CERTIORARI GRANTED MARCH 13, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 918

HUBERT L. WILL, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before Hon. Luther M. Swygert, Circuit Judge.

No. 15607

UNITED STATES OF AMERICA, Petitioner,

vs.

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois, Respondent.

ORDER—March 15, 1966

Upon consideration of the emergency petition of the United States of America for a stay order pending filing of a petition for mandamus, It Is Ordered that said stay be granted and all proceedings in Case No. 65 CR 432, United States v. Simmie S. Horwitz, and in Case No. 65 CR 464, United States v. Simmie S. Horwitz, pending before Honorable Hubert L. Will, Judge of the United States District Court for the Northern District of Illinois, be stayed until further order of this Court.

And, It Is Further Ordered that the United States of America, Petitioner, be granted leave to file its petition for mandamus to vacate the order directing petitioner to answer Item 25(a), (b), (c), (e), (f) and (g) of the Bill of Particulars by Monday, March 21, 1966.

[fol. 2] [File endorsement omitted]

[fol. 3]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 15607

[Title omitted]

PETITION FOR WRIT OF MANDAMUS—Filed March 21, 1966

Now comes the United States of America by Edward V. Hanrahan, United States Attorney for the Northern District of Illinois, and files this, its petition for a writ of mandamus against the Honorable Hubert L. Will, United States District Judge of the United States District Court for the Northern District of Illinois and respectfully represents:

1. On June 15, 1965, indictment No. 65 CR 432 was returned in the United States District Court for the Northern District of Illinois charging one Simmie S. Horwitz with a violation of Title 26, United States Code, Section 7206(1). (App. 8).[1]

[fol. 4] 2. On June 29, 1965, indictment No. 65 CR 464 was returned in the United States District Court for the Northern District of Illinois charging Simmie S. Horwitz with a similar but distinct violation of Title 26, United States Code, Section 7206(1). (App. 7). At all subsequent proceedings these indictments have been dealt with on a consolidated basis.

3. On September 7, 1965, the defendant filed, with certain other motions, a motion in the alternative for a bill of particulars. (App. 9-15).

4. Following the filing on October 21, 1965 of the Government's answer in opposition to defendant's motion for a

[1] References to (App. . . .) are to the Appendix filed with this Petition.

bill of particulars (App. 15-27), and the filing, on November 1, 1965, of the defendant's reply in support of his motion for a bill of particulars, the Court, on November 29, 1965, entered an order granting defendant's motion for a bill of particulars, except as to particulars 4 and 29(b). (App. 46).

5. On December 3, 1965, the Government filed a motion to vacate the Court's order of November 29, 1965, with respect to particulars 7, 14, 25, 28, and 29(a). (App. 46).

6. On December 7, 1965, the Court denied the Government's motion to vacate the certain portions of the Court's order of November 29, 1965, with the exception of question 25(d). (App. 47). Subsequently, on March 7, 1966, the Court stated that the Government would not be required to answer question 29(a). (App. 48).

7. The Government has filed answers to all questions contained in defendant's bill of particulars as directed by the Court, except question 25(a), (b), (c), (e), (f), and (g). On March 14, 1966, the Government informed the Court that it declined to answer that question. The causes were continued to March 15, 1966.

[fol. 5] 8. On March 15, 1966, on petition of the Government, this Court granted a stay of all proceedings until further order of this Court and granted the Government leave to file its petition for mandamus to vacate the District Court's order directing the Government to answer certain items of the bill of particulars by March 21, 1966. (App. 49).

9. Question 25 of the defendant's bill of particulars, which the District Court has ordered the Government to answer, except for part (d), is set forth as follows, together with question 24, which the Government has answered in the affirmative:

> "24. Does the Government rely upon any oral statements of the Defendant to support the charge in the several counts of the Indictments.

"25. If the answer to Request No. 24 is in the affirmative, state with respect to each such statement, if there was more than one:

a. The name and address of the person to whom the statement was made;

b. The date on which the statement was made;

c. The place where it was made;

d. The substance of the statement;

e. Whether the persons to whom the statement was made was a Government Agent at the time of the statement;

f. The names and addresses of any other persons present at the time the statement was made; and

g. Whether a written memorandum or verbatim transcript of the oral statement was made, and, if so, whether the Government has possession of the memorandum or transcript."

10. The scope of Rule 7(f) and Rule 16 of the Federal Rules of Criminal Procedure is to fully advise the defendant of the nature of the charge. *Wong Tai* v. *United* [fol. 6] *States,* 273 U.S. 77, 82 (1927). The Rules do not permit, and the respondent is without power to order the government to furnish a list of witnesses. *United States* v. *Eddington,* 328 F.2d 760 (7th Cir. 1964), cert. den. 379 U.S. 818; *Cordova* v. *United States,* 303 F.2d 454, 455 (10th Cir. 1962); *Dean* v. *United States,* 265 F.2d 544 (8th Cir. 1959); *Bohn* v. *United States,* 260 F.2d 773 (8th Cir. 1958), cert. den. 358 U.S. 931. Unless this Court proscribes such unwarranted disclosure of the Government's witnesses, the respondent will be permitted to totally disregard the limitations of the criminal discovery rules which this Court recently held to have the force and effect of law and to be binding on the District Judge. *United States* v. *Igoe,* 331

F.2d 766 (7th Cir. 1964), cert. den. 380 U.S. 942, reh. denied 380 U.S. 989.

11. Where Congress has felt that a list of witnesses is necessary in the administration of criminal law, it has so provided. Congress has required that the Government produce a list of its witnesses only in treason and capital offenses and only then the list is to be produced three days before the commencement of trial. 18 U.S.C. 1342. The statute does not apply to non-treason and non-capital offenses. *United States* v. *Van Duzee*, 140 U.S. 169, 173 (1891).

12. Neither the federal statutes, existing discovery rules, nor the Amendment transmitted this term by the United States Supreme Court to Congress to become effective July 1, 1966, empower the court to authorize the discovery ordered by the respondent. If there are impelling reasons for furnishing the identity of the Government's material witnesses in advance of trial, other provisions should be made by rule or statute. Yet, in the absence of any authorization whatsoever, after considering only the defendant's [fol. 7] unsupported allegation of need (App. 14-15), the respondent ordered the Government to reveal nearly all of its evidence in advance of trial, including a list of its material witnesses. The Federal Rules of Criminal Procedure were designed to protect the rights of the Government as well as the rights of the defendant, and they do not contemplate unlimited discovery by the defendant. *Bowman Dairy* v. *United States*, 341 U.S. 214 (1951).

13. This Court, in *Atlass* v. *Miner*, 265 F.2d 312-319 (7th Cir. 1959), and the Supreme Court, in affirming *Miner* v. *Atlass*, 363 U.S. 641 (1960), restrained by writ of mandamus a District Judge from expanding discovery. In the cited case the Supreme Court found the proposed extensions of discovery not within the rule-making power reserved to the District Courts under Rule 44 of the Admiralty Rules. Here the respondent has attempted to extend criminal dis-

covery beyond the Rules in violation of Rule 57(a) of the Federal Rules of Criminal Procedure which prohibits the District Court from making rules in violation of the Federal Rules of Criminal Procedure. This Court has awarded writs of mandamus and prohibited unauthorized discovery when it determined that a " . . . critical issue raised at this juncture strikes at a fundamental procedural question. . . . " *Atlass* v. *Miner,* 265 F.2d 312, 313 (7th Cir. 1959). A fundamental procedural question is here raised: must the Government disclose a list of its witnesses to the defendant in advance of trial? As in *Atlass,* there is no such provision in the rules permitting the court to order such disclosure.

14. If the respondent's patently illegal ruling is not reviewable, a "serious interference with the prosecution of persons indicted for criminal offenses might result." *Ex* [fol. 8] *parte United States,* 287 U.S. 241, 249 (1932). The obtaining of a definitive statement of the applicable legal principle is vital to the proper administration of criminal justice. The Government has no remedy other than by mandamus. *Carroll* v. *United States,* 354 U.S. 394, 399-400, 404-405 (1957); *United States* v. *Heath,* 260 F.2d 623, 627-628, 631-632 (9th Cir. 1958).

15. This Court has supervisory jurisdiction to issue a writ of mandamus ordering the respondent to vacate the illegal order jeopardizing effective prosecution of the defendant. *United States* v. *Igoe,* 331 F.2d 766 (7th Cir. 1964), cert. den. 380 U.S. 942, reh. denied 380 U.S. 989; *Howes Leather Company* v. *LaBuy,* 226 F.2d 703, 708-711 (7th Cir. 1955), affd. sub nom. *LaBuy* v. *Howes Leather Company,* 352 U.S. 249, 255-257; *Atlass* v. *Miner,* 265 F.2d 312, 313 (7th Cir. 1959), affd. *Miner* v. *Atlass,* 363 U.S. 641-650; *Schlagenhauf* v. *Holder,* 321 F.2d 43 (7th Cir. 1963), vacated and remanded on other grounds, 379 U.S. 104, 109-110; *United States* v. *Smith,* 331 U.S. 469, 471, 474 (1947); *De Beers Mines* v. *United States,* 325 U.S. 212, 217 (1945); *Ex Parte United States,* 287 U.S. 241, 246, 249 (1932); *Virginia* v. *Rives,* 100 U.S. 313, 323 (1879).

Wherefore, for the foregoing reasons, we respectfully request that this Court issue a writ of mandamus ordering the Honorable Hubert L. Will to vacate his order direct-
[fol. 9] ing the Government to answer question 25 of the defendant's motion for a bill of particulars.

Respectfully submitted,

Edward V. Hanrahan, United States Attorney.

John Peter Lulinski, Lawrence Jay Weiner, Richard G. Schultz, Robert A. Galbraith, Assistant United States Attorneys, Of Counsel.

[fol. 10] *Duly sworn to by Richard G. Schultz, jurat omitted in printing.*

[fol. 11]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 15607

UNITED STATES OF AMERICA, Petitioner,

vs.

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois, Respondent.

Appendix to Petition for Writ of Mandamus—Filed March 21, 1966

[File endorsement omitted]

[fol. 12]

DOCKET ENTRIES

Title of Case—The United States vs. Simmie S. Horwitz 7119 Tripp Ave., Lincolnwood, Ill.

Attorneys—

For U.S.—Edward V. Hanrahan, U.S. Atty., R. A. Galbraith, Asst., R. G. Schultz, Asst.

For Defendant: Harvey Silets, 7 So. Dearborn St.

Violation: Prepared a false Income Tax Return 1 Count Sec. 7206(1), Internal Revenue Code of 1965: T. 26, U.S.C.

Date	Proceedings
6-15-65	Filed indictment and designation (65 CR 432) (Comm. $1,000.00 O. R.) (JS 2)
6-15-65	Order indictment returned in open court—Perry, J. (65 CR 432)
6-29-65	Filed indictment and designation (65 CR 464) (Comm. $1,000.00 O.R.) (JS 2)
6-29-65	Order Indictment returned in open Court.—Perry, J. (65 CR 464) sw
7- 6-65	Filed Appearance Bond for $1,000.00 O.R. sw
7- 6-65	Defendant with counsel waives reading of the Indictment and enters plea of not guilty. Defendant given 60 days to file motions he deems appropriate. Government given 15 days thereafter to reply to motions if filed. Cause continued to August 9, 1965 at 2 P.M. before Judge Hubert L. Will, to be set for trial. With no objection by the Government Defendant may be enlarged on his own recognizance in the sum of $1,000.00—Hoffman, J. Mailed Notices 7-8-65 sw

[fol. 13]

Date	Proceedings
8- 9-65	Order cause continued to September 27, 1965 at 10:00 A.M. to set trial.—Will, J. Mailed Notices 8-11-65 sw
9- 7-65	Filed Defendants motion in the alternative for bill of particulars.
9- 7-65	Filed brief in supoŕt of defendant's motion in the alternative for bill of particulars
9- 7-65	Motion to dismiss the indictment for violation of Rule 6(e) of the Federal rules of Criminal Procedure.
9- 7-65	Filed defendant's motion for entry of an order dismissing the indictments.
9- 7-65	Filed Memorandum in support of defendant's motion to dismiss the indictment for violation of Rule 6(e) of the Federal Rules of Criminal Procedure.
9- 7-65	Filed Certificate of mailing.
9-21-65	On motion of Government, order time to answer defendant's pre-trial motions extended for a period of 20 days, defendant to reply within 10 days thereafter. Order defendants pre-trial motions taken under advisement and cause removed from the call of September 27, 1965.—Will, J Mailed Notices 9-22-65 sw
10- 8-65	Government's motion to extend to answer defendants motion for Bill of Particulars from October 11, 1965 to and including November 20, 1965 granted.—Will, J Notices 10-11-65 sw

[fol. 14]

10-21-65	Filed Government's answer to Defendant's motion in the alternative for Bill of Particulars. (To HLW) sw

Date	Proceedings
11- 1-65	Filed defendant's reply in support of His Motion for Bill of Particulars
11- 1-65	Filed Defendant's reply to motion to dismiss for violation of Rule 6(e) (to HLW) sw
11- 2-65	Motion to extend time for filing Reply Briefs to November 5, 1965, by agreement, granted.—Will, J Notices 11-3-65 sw
11- 5-65	Filed Defendant's reply memorandum in support of his motion for entry of an order dismissing the indictments. (To Judge Will.) sw
11-19-65	On Court's own motion, order cause set for November 29, 1965 at 10:00 A.M. for ruling on pending motions and to set for trial.—Will, J Notices 11-22-65 sw
11-29-65	Order defendant's motions to dismiss the indictment denied. Order defendant's motion for a bill of particulars granted, except as to particulars 4 and 29(b). Order cause set for January 3, 1966 at 2:00 P.M. to set trial.—Will, J Notices 11-30-65 sw
12- 3-65	Governments motion to vacate court order of November 29, 1965 and memorandum in support taken under advisement.—Will, J Notices 12-6-65 sw
[fol. 15]	
12- 7-65	Filed Memorandum opinion (Copy to D.A. & Harvey Silets) sw
12- 7-65	Pursuant to memorandum opinion this day filed order Government's motion to vacate certain portions of this Court's order of November 29, 1965 denied with the exception of question 25(d).—Will, M Notices 12-9-65 sw

Date	Proceedings
12-10-65	Filed Government's answer to Defendant's bill of particulars (To HLW) (Refers also to Cause No. 65 CR432) sw
12- 3-65	Filed motion
12- 3-65	Filed memorandum in support of the Government's motion to vacate the order of this court directing the United States of America to furnish to the Defendant the names and addresses of the potential Government witnesses it proposes to use in this cause. (To HLW) sw
12-23-65	On Court's own motion, order cause reset from January 3, 1966 to January 4, 1966 at 10:00 A.M. to set trial.—Will, J Notices 12-27-65 sw
1- 4-66	Filed motion for entry of an order directing the Government to furnish particulars, or, in the alternative, to dismiss indictments.
1- 4-66	Motion for entry of an Order directing the Government to furnish particulars, or in the alternative, to dismiss Indictments, entered and continued to March 7, 1966 at 10:00 A.M.—Will, J. (Refers also to 65 ER 432)
[fol. 16]	
1- 4-66	Filed motion to dismiss indictments
1- 4-66	Defendant's motion to dismiss the indictments entered and continued to March 7, 1966 at 10:00 A.M.—Will, J Notices 1-10-66 sw
1- 4-66	Order cause continued to March 7, 1966 at 10:00 A.M. to set trial.—Will, J Notices 1-10-66 sw
1- 4-66	Filed amended bill of Particulars (To: HLW) sw

Date	Proceedings	
1-26-66	Clerk's File Copy of Transcript of Proceedings had before Hon. Hubert L. Will on Dec. 3, 1965 at 10 A.M. filed by Official Court Reporter (Re 65 CR 432 and 65 CR 464).	r
1-26-66	Clerk's File Copy of Transcript of Proceedings had before Hon. Hubert L. Will on January 4, 1966 at 10 A.M. filed by Official Court Reporter (Re 65 CR 432 and 65 CR 464).	r
1-26-66	Clerk's File Copy of Transcript of Proceedings had before Hon. Hubert L. Will on November 29, 1965 at 10 A.M. filed by Official Court Reporter (Re 65 CR 432 and 65 CR 464).	r
3- 7-66	Order Government to answer questions 14 and 25 of Defendant's motion for Bill of Particulars, as originally requested, within one (1) week. Order cause continued to March 14, 1966 at 10:00 A.M. to set trial.—Will, J Notices 3-9-66	sw
3-14-66	Filed Government's answer to item 14 of the Defendant's Bill of Particulars. (to HLW. Filed in 65 CR 432)	sw
[fol. 17]		
3-14-66	Government refuses to answer question #25 of the defendant's motion for bill of particulars as limited and as ordered by the Court. Defendant renews motion to dismiss the indictment and ruling on said motion reserved. Order cause continued to March 15, 1966 at 10:00 A.M.—Will, J Notices 3-15-66	sw
3-15-66	Defendant's motion to dismiss indictment continued generally.—Will, J Notices 3-16-66	sw

Date	Proceedings
3-16-66	Filed certified copy of Order of U.S.C.A. granting stay of all proceedings until further order of court and U. S. granted leave to file its petition for mandamus to vacate order directing petitioner to answer certain items of the Bill of Particulars by March 21, 1966 (also in 65 CR 432) ho

Clerk's Certificate to foregoing papers (omitted in printing).

[fol. 18]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

VIO: Title 26, United States Code, Section 7206(1), Internal Revenue Code of 1954.

No. 65 CR 464

UNITED STATES OF AMERICA

v.

SIMMIE S. HORWITZ

INDICTMENT—Filed June 29, 1965

The June 1965 Grand Jury charges:

That on or about June 16, 1960, in the Northern District of Illinois, Eastern Division,

SIMMIE S. HORWITZ, defendant, did willfully and knowingly make and subscribe a 1959 United States Corporation Income Tax Return on behalf of Scott Pharmacy, Inc., 2459

West Devon Avenue, Chicago, Illinois, which was verified by a written declaration that it was made under the penalties of perjury, which return he did not believe to be true and correct as to every material matter in that it was stated in the said 1959 United States Corporation Income Tax Return that the gross sales were $68,522.97, whereas he then and there well knew and believed such statement was not true and correct in that Scott Pharmacy, Inc., Chicago, Illinois, had a large amount of additional gross sales during [fol. 19] the calendar year of 1959; in violation of Title 26, United States Code, Section 7206(1), Internal Revenue Code of 1954.

A True Bill:

.....

Foreman

.....

United States Attorney

RGS:sh

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

VIO: Title 26, United States Code, Section 7206(1), Internal Revenue Code of 1954.

No. 65 CR 432

UNITED STATES OF AMERICA

v.

SIMMIE S. HORWITZ

INDICTMENT—Filed June 15, 1965

The June 1965 Grand Jury charges:

That on or about June 16, 1959, in the Northern District of Illinois, Eastern Division,

SIMMIE S. HORWITZ, defendant, did willfully and knowingly make and subscribe a 1958 United States Corporation Income Tax Return on behalf of Scott Pharmacy, Inc., 2459 West Devon Avenue, Chicago, Illinois, which was verified by a written declaration that it was made under the penalties of perjury, which return he did not believe to be true and correct as to every material matter in that it was stated in the said 1958 United States Corporation Income Tax Return that the gross sales were $44,201.79, whereas he then and there well knew and believed such statement was not true and correct in that Scott Pharmacy, Incorporated, Chicago, Illinois had a large amount of additional gross [fol. 20] sales during the calendar year of 1958; in violation of Title 26, United States Code, Section 7206(1), Internal Revenue Code of 1954.

A True Bill:

.....

Foreman

.....

United States Attorney

IN THE UNITED STATES DISTRICT COURT

No. 65 CR 432

No. 65 CR 464

DEFENDANT'S MOTION IN THE ALTERNATIVE FOR BILL OF PARTICULARS—Filed September 7, 1965

Now Comes the Defendant, Simmie S. Horwitz, by and through his attorneys, Harris, Burman and Silets, and respectfully moves this Court in the alternative, if the Court denies the Defendant's Motion to Dismiss the Indictment, for the entry of an Order directing the United States to furnish the Defendant, in the captioned cases, with a Bill of Particulars as follows:

1. State what is the specific act or acts the Government alleges to have been committed by the Defendant in each of the years 1958 and 1959 in violation of Section 7206(1).

2. State what act or acts did the Defendant perform in order to "make" the United States Income Tax Return which are the subject of the captioned Indictments. Give the date and place of each such act.

3. State what act or acts did the Defendant perform in order to "subscribe" the United States Income Tax Returns which are the subject of the captioned Indictments. Give the date and place of each such act.

[fol. 21] 4. State with specificity what criminal act or acts were performed by the Defendant on June 16, 1959, as alleged in Indictment 65 CR 432.

5. State the alleged correct amount of the gross sales for Scott Pharmacy, Inc. for each of the years 1958 and 1959.

6. State respectively for each of the said years the amount and source of each and all of the items added to the reported gross sales in computing the amounts stated in answer to Request No. 5.

7. In describing the items requested in Request No. 6, state the date received, the gross amount, the name and address of from whom received, and the nature, amount and date paid, and the payee, date, and amount of any deductions allowed or allowable against the said gross amounts.

8. State the amount and source of each and all of the items of deduction allowed in computing the alleged correct amount of gross sales for each of the said years.

9. State the amount and source of each and all of the items of deduction disallowed in computing the alleged correct amount of gross sales for each of the years.

10. State whether the Government relies upon any books, records, documents or other papers of Scott Pharmacy,

Inc. obtained by the Internal Revenue Service. If so, state with specificity which such books, records, documents or other papers or portion thereof, when the same were obtained, where obtained, and by whom and from whom obtained.

11. State whether the Government will rely on proof upon the net worth, expenditures, bank deposits, or other theory or method of proof and, if so, whether said theory will be relied upon in whole or in part as corroborative of any other method of proof, including the specific receipt method. State also whether the said method of proof ap- [fol. 22] plies to proof of additional gross sales of the Corporation and/or income or other benefit to the Defendant.

12. In the event the Government has determined the unreported gross sales of the Corporation and/or income or benefit to the Defendant for either of the years upon the so-called net worth and/or expenditures method, then state the character and value of each asset owned by the Corporation and/or the Defendant, including the amount of cash on hand, on deposit, and receivables at the beginning and end of each of the said years covered by the Indictments.

13. In the event the Government has determined the unreported gross sales of the Corporation and/or income or benefit to the Defendant for either of the said years in reliance in whole or in part upon the so-called bank analysis or bank deposit method, list the bank accounts analyzed and itemize the deposits alleged to constitute unreported gross sales, setting forth the source, where known, deposits constituting transfers or redeposits and deposits conceded to be non-income items.

14. In the event the Government has determined the unreported gross sales of the Corporation and/or income or benefit to the Defendant for either of the years upon the specific item method, list each such item, including the

name and address of the payor, the date paid, the amount, and the disposition by the Corporation of each of such receipts.

15. State whether any of the alleged unreported gross sales was received directly, in each of the said years, by the Defendant, and, if so, identify the date and amount of such direct receipts.

16. State whether the alleged unreported gross sales in each of the said years was indirectly received by the Defendant and, if so, state the date, amount, and nature of such receipts.

[fol. 23] 17. State upon which line and page of each of the respective United States Income Tax Returns alleged in the Indictments there appears the material matter alleged to be believed by the Defendant as not true and correct.

18. Does the Government claim there are any other material matters contained in each of the respective U.S. Income Tax Returns alleged in the Indictments which are not true and correct and which the Defendant believed were not true and correct when he allegedly subscribed the said returns.

19. If the answer to Request No. 18 is in the affirmative, state as to each such material matter:

a. The nature thereof;

b. Wherein the same appears on the respective income tax return;

c. The correct material matter, including the amount and source, the date received or expended, and the payor or recipient thereof.

20. Is the Government now in possession of any books, papers, documents or tangible objects obtained from or belonging to the Defendant or obtained from others by seizure or by process.

21. If the answer to Request No. 20 is in the affirmative, state with particularity:

a. The nature and description of each such book, paper, document, or tangible object;

b. From whom obtained;

c. When obtained;

d. Whether the same was obtained by seizure or by process;

e. The nature of the process;

f. Whether the Government intends to rely on all or part of the said books, papers, documents, or tangible objects, and, if so, which part or parts, and for what purpose.

[fol. 24] 22. Does the Government rely upon any acts, including but not limited to the acts stated in the respective counts of the Indictments, performed by the Defendant to support the charge in the several counts of the Indictments that the Defendant made and subscribed a return which he did not believe to be true and correct as to every material matter.

23. If the answer to Request No. 22 is in the affirmative, state with respect to each such act, if there was more than one:

a. The nature of the act;

b. The date on which it was performed;

c. The place where it was performed; and

d. The names and addresses of persons, other than the Defendant, present when the act was performed.

24. Does the Government rely upon any oral statements of the Defendant to support the charge in the several counts of the Indictments.

25. If the answer to Request No. 24 is in the affirmative, state with respect to each such statement, if there was more than one:

a. The name and address of the person to whom the statement was made;

b. The date on which the statement was made;

c. The place where it was made;

d. The substance of the statement;

e. Whether the persons to whom the statement was made was a Government Agent at the time of the statement;

f. The names and addresses of any other persons present at the time the statement was made; and

g. Whether a written memorandum or verbatim transcript of the oral statement was made, and, if so, whether the Government has possession of the memorandum or transcript.

[fol. 25] 26. Does the Government rely upon any written statement of the Defendant to support the charge in the several counts of the Indictments.

27. If the answer to Request No. 26 is in the affirmative, state with respect to each such written statement, if there was more than one:

a. The date the written statement was made;

b. The names and addresses of the person or persons to whom the said written statement was given;

c. The substance of the written statement; and

d. Whether the statement is now in the possession of the Government.

28. Does the Government rely upon the statement of any person, other than the Defendant, to support the charge in the several counts of the Indictments.

29. If the answer to Request No. 28 is in the affirmative, state with respect to each such person, if there is more than one:

a. The name and address of each such person or persons; and

b. The substance of their statements.

30. State whether the Government will rely in full or in part on the truth or falsity of any personal United States Income Tax Returns filed by the Defendant. If so, state which returns and the particular matter contained therein upon which the Government will rely.

Conclusion

The Defendant respectfully represents that by reason of the adherence of the United States in this cause to bare statements of a purported offense in quasi-statutory language, and by reason of the absence from the Indictments of any details of the nature and cause of the accusations, he is unable to determine and know the nature and cause [fol. 26] of the accusations made against him. It is not possible for the Defendant to ascertain the exact nature of the offense charged against him inasmuch as the purported accusation is so vague and indefinite as to preclude him from ascertaining which of several statutes of the United States he is accused of violating. The Defendant respectfully asserts that the offense is so insufficiently identified so to make it impossible for him to plead a conviction or an acquittal thereon in bar of a possible second prosecution for the same offense, and, further, that he will

be unable to make adequate preparation of a defense against the purported charge or charges made against him by the pending Indictments.

Wherefore, it is requested that the Court order the United States Attorney, on behalf of the Plaintiff, United States Of America, to furnish a Bill of Particulars, in writing, informing the Defendant of the foregoing matters within such time as the Court considers appropriate.

Respectfully submitted,

....., Attorneys for Simmie S. Horwitz.

IN THE UNITED STATES DISTRICT COURT

65 CR 432, 65 CR 464

GOVERNMENT'S ANSWER TO DEFENDANT'S BILL OF PARTICULARS—Filed December 10, 1965

Now comes the United States of America by Edward V. Hanrahan, United States Attorney for the Northern District of Illinois, and in answer to the defendant's Bill of Particulars, states as follows:

1. State what is the specific act or acts the Government alleges to have been committed by the Defendant in each [fol. 27] of the years 1958 and 1959 in violation of Section 7206(1).

Answer:

The defendant willfully and knowingly made and subscribed to a 1958 and 1959 United States corporation income tax return to Scott Pharmacy, Inc., which he did not believe to be true and correct, in that he understated the gross sales, well knowing and believing the statement of gross sales was not true and correct.

2. State what act or acts did the Defendant perform in order to "make" the United States Income Tax Returns which are the subject of the captioned indictments. Give the date and place of each such act.

Answer:

The Government has analyzed the meaning of "make" in its Memorandum in Opposition to the Defendant's Motion to Dismiss Indictment 65 CR 432 on the grounds that the Statute of Limitations has run. Accordingly, the defendant "made" the returns when he filed the returns. The 1958 and 1959 returns were filed on June 16, 1959, and on June 16, 1960, respectively, at the office of the District Director of Internal Revenue Service, Chicago, Illinois.

3. State what act or acts did the Defendant perform in order to "subscribe" the United States Income Tax Returns which are the subject of the captioned Indictments. Give the date and place of each such act.

Answer:

The defendant "subscribed" to each return by signing his name thereon. The places and dates of such acts are unknown.

4. State with specificity what criminal act or acts were performed by the Defendant on June 16, 1959, as alleged in Indictment 65 CR 432.

[fol. 28] Answer:

Pursuant to Court order, the Government is not required to answer Question No. 4.

5. State the alleged correct amount of the gross sales for Scott Pharmacy, Inc. for each of the years 1958 and 1959.

Answer:

1958—$57,763.67

1959—$94,173.66

6. State respectively for each of the said years the amount and source of each and all of the items added to the reported gross sales in computing the amounts stated in answer to Request No. 5.

Answer:

1958—amount—$13,561.88
source—Sales of Scott Pharmacy, Inc.

1959—amount—$25,650.69
source—Sales of Scott Pharmacy, Inc.

7. In describing the items requested in Request No. 6, state the date received, the gross amount, the name and address of from whom received, and the nature, amount and date paid, and the payee, date, and amount of any deductions allowed or allowable against the said gross amounts.

Answer:

The deductions allowed or allowable against said amounts are those amounts reflected in the respective returns. See Government's Motion to vacate order of November 29, 1965 regarding receipts of gross income.

8. State the amount and source of each and all of the items of deduction allowed in computing the alleged correct amount of gross sales for each of the said years.

[fol. 29] Answer:

1958—amount—$19,180.52
source—1958 corporate income tax return of Scott Pharmacy, Inc.

1959—amount—$28,944.09
source—1959 corporate income tax return of Scott Pharmacy, Inc.

9. State the amount and source of each and all of the items of deduction disallowed in computing the alleged correct amount of gross sales for each of the years.

Answer:

None.

10. State whether the Government relies upon any books, records, documents or other papers of Scott Pharmacy, Inc. obtained by the Internal Revenue Service. If so, state with specificity which such books, records, documents or other papers or portion thereof, when the same were obtained, where obtained, and by whom and from whom obtained.

Answer:

The Government will rely, in whole or in part, on the following documents:

All records of prescriptions filled by Scott Pharmacy, Inc. from January, 1958, through December 31, 1960; customer file cards relating to all prescription sales during the period of January, 1958, through December 31, 1960; books and records of customer charge accounts for the years 1958, 1959, and 1960; records of accounts receivable and accounts payable for the years 1958, 1959, and 1960; all invoices, bills, documents, and letters relating to all purchases of all drugs, chemicals, powders, compounds, capsules, and all other supplies received by Scott Pharmacy from suppliers including, but not limited to, the fol- [fol. 30] lowing: Arthur Bennett; Bennett Pharmacy; Lapp Company, G. Baskett; Pacific Drug Distributors, Inc.; and Boyce Products, for the years 1958, 1959, and 1960; all records of all sales and all shipments of capsules, drugs,

supplies, and all pharmaceutical products by Scott Pharmacy, Inc. in the years 1958, 1959, and 1960; the corporate lilly book; all 1958, 1959, and 1960 daily cash register tapes, together with all cash register recap totals; all monthly sales recap totals; all 1958, 1959, and 1960 store receipt envelopes and contents; all records of loans made to and loans made by Scott Pharmacy, Inc., together with the notes, records of payments and records of repayments; all records of dividends paid by Scott Pharmacy, Inc.; all canceled checks, deposit slips and bank statements of all bank accounts used by Scott Pharmacy, Inc. during the years 1958, 1959, and 1960; the corporation minute book; all invoices for the years 1958, 1959, and 1960; recapitulation records of the expenses incurred before the Scott Pharmacy, Inc. began business; recapitulation of all records of income and expenses from the operation of Scott Pharmacy, Inc. to December 31, 1960; all accountant work papers for the years 1958, 1959, and 1960 of Scott Pharmacy, Inc.; and all books and records of the Scott Pharmacy, Inc. used directly or indirectly in the preparation of the 1958, 1959, and 1960 income tax returns for Scott Pharmacy, Inc.

The above items have been examined at Scott Pharmacy, Inc. and analyzed at the offices of the Internal Revenue Service throughout the investigation, beginning in October, 1960, and ending in 1963. The investigators were Special Agent Shadduck, Revenue Agent Neugebauer, and Revenue Agent Ansell. Some of the above documents were also delivered by Mr. Silets, attorney for the defendant, to the 1965 June Grand Jury. The remaining documents were obtained from corporate officers and agents.

[fol. 31] 11. State whether the Government will rely on proof upon the net worth, expenditures, bank deposits, or other theory or method of proof and, if so, whether said theory will be relied upon in whole or in part as corroborative of any other method of proof, including the specific receipt method. State also whether the said method of proof

applies to proof of additional gross sales of the Corporation and/or income or other benefit to the Defendant.

Answer:

The Government's theory of proof will rely upon corporation records corroborated by specific items and possibly by bank deposits. The Government does not understand the meaning of the last sentence of Question No. 11.

12. In the event the Government has determined the unreported gross sales of the Corporation and/or income or benefit to the Defendant for either of the years upon the so-called net worth and/or expenditures method, then state the character and value of each asset owned by the Corporation and/or the Defendant, including the amount of cash on hand, on deposit, and receivables at the beginning and end of each of the said years covered by the Indictments.

Answer:

The Government is not relying on the "so-called net worth and/or expenditures method."

13. In the event the Government has determined the unreported gross sales of the Corporation and/or income or benefit to the Defendant for either of the said years in reliance in whole or in part upon the so-called bank analysis or bank deposit method, list the bank accounts analyzed and itemize the deposits alleged to constitute unreported gross sales, setting forth the source, where known, deposits constituting transfers or redeposits and deposits conceded to be non-income items.

[fol. 32] Answer:

In its investigation to determine whether or not the Corporation had unreported gross sales for either of the years here in question, some partial analyses were made

by the Government of the checking account of the Corporation maintained at the Devon-North Town Bank, 2345 West Devon, Chicago, Illinois; the checking account of Simmie Horwitz and Arthur Bennett at the Devon-North Town Bank, 2345 West Devon, Chicago, Illinois; the checking account of Dorothy Horwitz at the Devon-North Town Bank, 2345 West Devon, Chicago, Illinois; the savings account of Dorothy Horwitz and Minna Rosen at the Cook County Federal Savings and Loan Association of Chicago, 2720 West Devon, Chicago, Illinois; the savings account of Sidney Horwitz and Dorothy Horwitz at the Community National Bank, Bal Harbour, Miami Beach, Florida; the account of Mrs. Dorothy Horwitz at the North Shore Bank, Miami Beach, Florida; and, of the account of Dorothy Horwitz and Minna Rosen at the Consumers National Bank of Chicago, 6401 Lincoln, Lincolnwood, Illinois.

These analyses have not been completed to the extent that an itemization of deposits which constitute unreported gross sales of the Corporation is available.

14. In the event the Government has determined the unreported gross sales of the Corporation and/or income or benefit to the Defendant for either of the years upon the specific item method, list each such item, including the name and address of the payor, the date paid, the amount, and the disposition by the Corporation of each of such receipts.

Answer:

See Government's Motion to Vacate Court Order of November 29, 1965.

[fol. 33] 15. State whether any of the alleged unreported gross sales was received directly, in each of the said years, by the Defendant, and, if so, identify the date and amount of such direct receipts.

Answer:

Assuming "directly" means personally received, the Government does not know the exact date and exact amounts of any receipts of unreported gross sales by the defendant.

16. State whether the alleged unreported gross sales in each of the said years was indirectly received by the Defendant and, if so, state the date, amount, and nature of such receipts.

Answer:

The Government does not know what is meant by "indirectly" received and is, therefore, unable to answer the question.

17. State upon which line and page of each of the respective United States Income Tax Returns alleged in the Indictments there appears the material matter alleged to be believed by the Defendant as not true and correct.

Answer:

1958—Page two, line one.

1959—Page one, line one.

18. Does the Government claim there are any other material matters contained in each of the respective U.S. Income Tax Returns alleged in the Indictments which are not true and correct and which the Defendant believed were not true and correct when he allegedly subscribed the said returns.

Answer:

All of the necessary recomputations which follow from an understatement of gross income.

[fol. 34] 19. If the answer to Request No. 18 is in the affirmative, state as to each such material matter:

a. The nature thereof;

b. Wherein the same appears on the respective income tax return;

c. The correct material matter, including the amount and source, the date received or expended, and the payor or recipient thereof.

Answer:

See answer to Question No. 18.

20. Is the Government now in possession of any books, papers, documents or tangible objects obtained from or belonging to the Defendant or obtained from others by seizure or by process.

Answer:

The Government has no books or records belonging to the defendant. It is in possession of the Corporate Minute Book.

21. If the answer to Request No. 20 is in the affirmative, state with particularity:

a. The nature and description of each such book, paper, document, or tangible object;

b. From whom obtained;

c. When obtained;

d. Whether the same was obtained by seizure or by process;

e. The nature of the process;

f. Whether the Government intends to rely on all or part of the said books, papers, documents, or tangible objects, and, if so, which part or parts, and for what purpose.

[fol. 35] Answer:

The book was obtained by grand jury subpoena from Harry Freeman. The Government has not determined whether or not or how it will rely upon the book.

22. Does the Government rely upon any acts, including but not limited to the acts stated in the respective counts of the Indictments, performed by the Defendant to support the charge in the several counts of the Indictments that the Defendant made and subscribed a return which he did not believe to be true and correct as to every material matter.

Answer:

Yes.

23. If the answer to Request No. 22 is in the affirmative, state with respect to each such act, if there was more than one:

a. The nature of the act;

b. The date on which it was performed;

c. The place where it was performed; and

d. The names and addresses of persons, other than the Defendant, present when the act was performed.

Answer:

23(a). In addition to the Government's answer to questions one, two and three of this bill of particulars, the defendant kept and maintained fraudulent corporate records, destroyed and seereted corporate records, impeded the Internal Revenue investigation and benefited from the receipt of unreported receipts of Scott Pharmacy, Inc.

23(b). Unknown, except as stated in answers to questions one, two, and three of this Bill of Particulars.

23(c). Unknown, except as stated in answers to questions one, two, and three of this Bill of Particulars.

[fol. 36] 23(d). Clifford Shadduck, Harry Ansell and Neugebauer were present when the Defendant attempted to impede investigation. Other names are unknown.

24. Does the Government rely upon any oral statements of the defendant to support the charge in the several counts of the Indictments.

Answer:

See Government's Motion to Vacate Court Order of November 29, 1965.

25. If the answer to Request No. 24 is in the affirmative, state with respect to each such statement, if there was more than one:

a. The name and address of the person to whom the statement was made;

b. The date on which the statement was made;

c. The place where it was made;

d. The substance of the statement;

e. Whether the persons to whom the statement was made was a Government Agent at the time of the statement;

f. The names and addresses of any other persons present at the time the statement was made; and

g. Whether a written memorandum or verbatim transcript of the oral statement was made, and, if so, whether the Government has possession of the memorandum or transcript.

Answer:

See Government's Motion to Vacate Court Order of November 29, 1965.

26. Does the Government rely upon any written statement of the Defendant to support the charge in the several counts of the Indictments.

[fol. 37] Answer:

No.

27. If the answer to Request No. 26 is in the affirmative, state with respect to each such written statement, if there was more than one:

a. The date the written statement was made;

b. The names and addresses of the person or persons to whom the said written statement was given;

c. The substance of the written statement; and

d. Whether the statement is now in the possession of the Government.

Answer:

See answer to Question No. 26.

28. Does the Government rely upon the statement of any person, other than the Defendant, to support the charge in the several counts of the Indictments.

Answer:

See Government's Motion to Vacate Court Order of November 29, 1965.

29. If the answer to Request No. 28 is in the affirmative, state with respect to each such person, if there is more than one:

a. The name and address of each such person or persons; and

b. The substance of their statements.

Answer:

29(a). See Government's Motion to Vacate Court Order of November 29, 1965.

29(b). Pursuant to Court order, the Government is not required to answer Question No. 29(b).

30. State whether the Government will rely in full or in part on the truth or falsity of any personal United [fol. 38] States Income Tax Returns filed by the Defendant. If so, state which returns and the particular matter contained therein upon which the Government will rely.

Answer:

The Government is relying on the 1958 and 1959 individual income tax returns of the defendant, in which he has understated his gross income received in the years 1958, 1959 and 1960.

Respectfully submitted,

Edward V. Hanrahan, United States Attorney.

IN THE UNITED STATES DISTRICT COURT

No. 65 CR 432—65 CR 464

AMENDED BILL OF PARTICULARS—Filed January 4, 1966

Now comes the United States of America by Edward V. Hanrahan, United States Attorney for the Northern District of Illinois, and amends its Bill of Particulars previously filed in the above cases and states as follows:

7. In describing the items requested in Request No. 6, state the date received, the gross amount, the name and address of from whom received, and the nature, amount and date paid, and the payee, date, and amount of any

deductions allowed or allowable against the said gross amounts.

Answer:

In describing the items requested in Request No. 6, the dates received and the gross amounts are as follows:

[fol. 39]

Date Received	Unreported Gross Receipts
October 6, 1958	$ 200.00
October 13, 1958	100.00
October 18, 1958	100.00
October 20, 1958	200.00
October 21, 1958	31.00
October 22, 1958	100.00
October 23, 1958	100.00
October 25, 1958	100.00
October 27, 1958	200.32
October 29, 1958	135.94
October 30, 1958	50.00
October 31, 1958	50.00
November 3, 1958	177.11
November 4, 1958	49.92
November 5, 1958	50.00
November 6, 1958	99.74
November 7, 1958	46.45
November 10, 1958	240.00
November 12, 1958	40.00
November 13, 1958	100.00
November 14, 1958	140.00
November 15, 1958	75.00
November 17, 1958	300.00
November 19, 1958	50.00
November 20, 1958	50.00
November 21, 1958	50.00
November 22, 1958	100.00
November 24, 1958	222.09

Date Received	Unreported Gross Receipts
November 25, 1958	50.00
November 26, 1958	50.00
November 28, 1958	95.00
November 29, 1958	100.00
[fol. 40]	
December 1, 1958	200.00
December 2, 1958	50.00
December 3, 1958	50.00
December 4, 1958	75.00
December 5, 1958	60.00
December 6, 1958	100.00
December 8, 1958	102.25
December 9, 1958	50.00
December 10, 1958	50.00
December 11, 1958	100.00
December 12, 1958	50.00
December 13, 1958	100.00
December 15, 1958	100.00
December 16, 1965	150.00
December 17, 1965	50.39
December 18, 1958	150.00
December 19, 1958	50.00
December 20, 1958	80.00
December 22, 1958	174.78
December 24, 1958	100.00
December 26, 1958	100.00
December 27, 1958	200.00
December 29, 1958	195.03
January 2, 1959	$ 50.00
January 3, 1959	199.59
January 5, 1959	200.00
January 6, 1959	100.00
January 7, 1959	100.00
January 8, 1959	100.00
January 9, 1959	100.00
January 10, 1959	100.00

	Date Received	Unreported Gross Receipts
	January 12, 1959	100.00
[fol. 41]		
	January 13, 1959	100.00
	January 14, 1959	25.00
	January 15, 1959	60.00
	January 16, 1959	50.00
	January 17, 1959	100.00
	January 19, 1959	100.00
	January 20, 1959	50.00
	January 24, 1959	200.00
	January 26, 1959	100.00
	January 28, 1959	100.00
	January 29, 1959	50.00
	January 30, 1959	100.00
	January 31, 1959	200.00
	February 2, 1959	200.00
	February 4, 1959	125.00
	February 5, 1959	50.00
	February 6, 1959	50.00
	February 9, 1959	100.00
	February 12, 1959	186.69
	February 13, 1959	60.00
	February 14, 1959	50.00
	February 16, 1959	100.00
	February 17, 1959	100.00
	February 18, 1959	50.00
	February 19, 1959	60.00
	February 20, 1959	150.00
	February 21, 1959	50.00
	February 23, 1959	75.00
	February 24, 1959	100.00
	February 25, 1959	50.00
	February 26, 1959	100.00
	April 1, 1959	93.00
[fol. 42]		
	April 6, 1959	50.00

Date Received	Unreported Gross Receipts
April 7, 1959	100.00
April 8, 1959	$ 100.00
April 9, 1959	50.00
April 10, 1959	50.00
April 11, 1959	75.00
April 13, 1959	100.00
April 14, 1959	50.00
April 16, 1959	100.00
April 17, 1959	100.00
April 18, 1959	300.00
April 20, 1959	200.00
April 21, 1959	25.00
April 24, 1959	50.00
April 25, 1959	50.00
April 27, 1959	150.00
April 28, 1959	25.00
April 30, 1959	100.00
May 2, 1959	100.00
May 4, 1959	200.00
May 5, 1959	400.00
May 7, 1959	100.00
May 8, 1959	100.00
May 9, 1959	50.00
May 11, 1959	300.00
May 12, 1959	100.00
May 14, 1959	100.00
May 15, 1959	100.00
May 16, 1959	100.00
May 19, 1959	75.00
May 20, 1959	50.00
May 28, 1959	100.00
[fol. 43]	
June 11, 1959	50.00
June 24, 1959	120.00
June 25, 1959	100.00

Date Received	Unreported Gross Receipts
July 1, 1959	100.00
July 2, 1959	100.00
July 3, 1959	154.00
July 6, 1959	300.00
July 7, 1959	49.60
July 9, 1959	50.00
July 10, 1959	50.00
July 11, 1959	200.00
July 13, 1959	50.00
July 14, 1959	100.00
July 16, 1959	190.00
July 17, 1959	150.00
July 18, 1959	120.00
July 20, 1959	80.00
July 23, 1959	150.00
July 24, 1959	125.00
July 25, 1959	100.00
July 27, 1959	80.00
July 30, 1959	108.00
July 31, 1959	150.00
August 1, 1959	52.00
August 3, 1959	124.98
August 4, 1959	89.82
August 5, 1959	98.00
August 6, 1959	152.00
August 7, 1959	110.00
August 8, 1959	100.00
August 10, 1959	200.00
August 11, 1959	122.92
August 13, 1959	150.00
[fol. 44]	
August 14, 1959	1.00
August 15, 1959	40.00
August 17, 1959	298.00
August 20, 1959	150.00
August 21, 1959	25.00

Date Received	Unreported Gross Receipts
August 22, 1959	50.00
August 24, 1959	250.00
August 26, 1959	40.00
August 27, 1959	100.00
August 29, 1959	250.00
August 31, 1959	240.76
September 1, 1959	25.00
September 3, 1959	200.00
September 5, 1959	50.00
September 8, 1959	200.00
September 9, 1959	190.00
September 10, 1959	76.00
September 11, 1959	173.65
September 12, 1959	125.00
September 14, 1959	200.00
September 17, 1959	103.06
September 18, 1959	90.00
September 19, 1959	247.00
September 21, 1959	100.00
September 22, 1959	100.00
September 24, 1959	85.00
September 25, 1959	40.00
September 26, 1959	125.00
September 28, 1959	85.00
September 29, 1959	150.00
October 1, 1959	225.00
October 2, 1959	75.00
[fol. 45]	
October 5, 1959	250.00
October 6, 1959	50.00
October 7, 1959	50.54
October 8, 1959	200.00
October 9, 1959	25.00
October 10, 1959	199.40
October 13, 1959	400.00

Date Received	Unreported Gross Receipts
October 15, 1959	300.00
October 16, 1959	100.00
October 17, 1959	100.00
October 19, 1959	150.00
October 22, 1959	50.00
October 23, 1959	225.00
October 24, 1959	70.00
October 26, 1959	100.00
October 27, 1959	125.00
October 28, 1959	50.00
October 29, 1959	150.00
October 30, 1959	59.82
October 31, 1959	150.00
November 2, 1959	100.00
November 3, 1959	150.00
November 4, 1959	125.00
November 5, 1959	125.00
November 6, 1959	90.00
November 7, 1959	50.00
November 9, 1959	150.00
November 10, 1959	50.00
November 11, 1959	50.00
November 12, 1959	100.00
November 13, 1959	45.00
November 14, 1959	150.00
November 16, 1959	150.00
[fol. 46]	
November 18, 1959	200.00
November 19, 1959	100.00
November 20, 1959	80.00
November 21, 1959	94.00
November 23, 1959	84.00
November 25, 1959	60.00
November 27, 1959	100.00
November 30, 1959	240.00

Date Received	Unreported Gross Receipts
December 1, 1959	110.00
December 2, 1959	100.00
December 3, 1959	90.00
December 4, 1959	200.00
December 5, 1959	200.00
December 7, 1959	300.00
December 8, 1959	150.00
December 10, 1959	150.00
December 11, 1959	70.00
December 14, 1959	200.00
December 15, 1959	50.00
December 16, 1959	100.00
December 18, 1959	150.00
December 17, 1959	200.00
December 19, 1959	200.00
December 21, 1959	150.00
December 24, 1959	40.00
December 26, 1959	125.00
December 28, 1959	100.00
December 31, 1959	100.00

[fol. 47] The dates upon which the balances of the unreported gross receipts were received are not known. The Government does not know the names and addresses of those persons from whom the above understated gross receipts were received.

The deductions allowed or allowable against said amounts are those amounts reflected in the respective corporate income tax returns.

14. In the event the Government has determined the unreported gross sales of the Corporation and/or income or benefit to the Defendant for either of the years upon the specific item method, list each such item, including the name and address of the payer, the date paid, the amount, and the disposition by the Corporation of each of such receipts.

Answer:

The Government respectfully declines to answer Request No. 14.

23. If the answer to Request No. 22 is in the affirmative, state with respect to each such act, if there was more than one:

a. The nature of the act;

b. The date on which it was performed;

c. The place where it was performed; and

d. The names and addresses of persons, other than the Defendant, present when the act was performed.

Answer:

23(a). In addition to the Government's answers to Requests No. 1, 2, and 3 of this Bill of Particulars, the defendant kept and maintained fraudulent corporate records, destroyed and secreted corporate records, secreted currency, impeded the Internal Revenue investigation, and [fol. 48] benefited from the receipt of unreported receipts of Scott Pharmacy, Inc.

23(b). Unknown, except as stated in answers to Requests No. 1, 2, and 3 of this Bill of Particulars.

23(c). Unknown, except as stated in answers to Requests No. 1, 2, and 3 of this Bill of Particulars and with respect to the secreting of currency and to the impeding of the investigation, said acts were performed on the premises of Scott Pharmacy, Inc., 2459 West Devon Avenue, Chicago, Illinois.

23(d). Special Agent Shadduck, Revenue Agent Ansell, and Revenue Agent Neugebauer were present when the defendant attempted to impede the investigation. Other names are unknown.

24. Does the Government rely upon any oral statements of the defendant to support the charge in the several counts of the Indictments.

Answer: Yes.

25: If the answer to Request No. 24 is in the affirmative, state with respect to each such statement, if there was more than one:

a. The name and address of the person to whom the statement was made;

b. The date on which the statement was made;

c. The place where it was made;

d. The substance of the statement;

e. Whether the persons to whom the statement was made was a Government Agent at the time of the statement;

f. The names and addresses of any other persons present at the time the statement was made; and

g. Whether a written memorandum or verbatim transcript of the oral statement was made, and, if no, whether the Government has possession of the memorandum or transcript.

[fol. 49] Answer:

The Government respectfully declines to answer Request No. 25(a), 25(b), 25(c), 25(e), 25(f), and 25(g). The Government has not been required to answer Request No. 25(d).

28. Does the Government rely upon the statement of any person, other than the Defendant, to support the charge in the several counts of the Indictments.

Answer:

Yes.

29. If the answer to Request No. 28 is in the affirmative, state with respect to each such person, if there is more than one:

a. The name and address of each such person or persons; and

b. The substance of their statements.

Answer:

The Government respectfully declines to answer Request No. 29(a). The Government has not been required to answer Request No. 29(b).

Respectfully submitted,

Edward V. Hanrahan, United States Attorney.

RAG:sjh

IN THE UNITED STATES DISTRICT COURT

Nos. 65 CR 432 & 65 CR 464

GOVERNMENT'S ANSWER TO ITEM 14 OF THE DEFENDANT'S BILL OF PARTICULARS—Filed March 14, 1966

Now comes the United States of America by Edward V. Hanrahan, United States Attorney for the Northern [fol. 50] District of Illinois and in answer to item 14 of the defendant's bill of particulars states as follows:

14. In the event the Government has determined the unreported gross sales of the Corporation and/or income or benefit to the Defendant for either of the years upon the specific item method, list each such item, including the name and address of the payor, the date paid, the amount, and the disposition by the Corporation of each of such receipts.

Answer:

The government's proof by method of specific item is predicated upon the record of sales of Scott Pharmacy, Inc., supplemented by specific sales not fully included in the sales records of the corporation. To list the specific sales as recorded in the corporation's records would require listing each sale of Scott Pharmacy as recorded in its records for the years 1958 and 1959. Since the total number of individual sales is probably in excess of 25,000 it would be burdensome and of no useful purpose to itemize each and every sale recorded in the corporation records. Unless the defendant requests and the court orders the government to make such a list itemizing the record sales of Scott Pharmacy, Inc., the government will only set forth in the attached appendix the specific items of sales which are not properly reflected in the records of Scott Pharmacy, Inc., and will be proven by testimony of the customer of Scott Pharmacy, Inc. The disposition of the corporation of any of the receipts by the following individuals is unknown.

Edward V. Hanrahan, United States Attorney.

RGS:mld:sjh

[fol. 51]

APPENDIX TO GOVERNMENT'S ANSWER

Rt. No.	Name	Address	Date Paid & Amount	Total Amount to Wide Ho Fisheries Mill Portsiz (1998) (1999)
613	Sara Stokes	3139 Hill Lane, Wilmette, Ill.	10-15-98 15.37	
			11-13-98 13.02	
			9-15-98 13.02	
			10-8-98 14.14	
			10-29-98 13.02	
			12-1-98 15.12	
			1-7-99 15.31	
			3-1-99 15.12	
			4-28-99 20.04	
			7-29-99 13.14	
			9-1-99 20.04	
			11-16-99 13.72	

Ex. No.	Name	Address	Date Paid & Amount	Total Amount to Which the Witness Will Testify (1958) (1959)
			3/23/59 $ 15.12	
			4/3/59 15.12	
			5/28/59 15.12	
			7/10/59 16.87	
			7/28/59 15.12	
			9/1/59 15.12	
			10/26/59 16.87	
			12/7/59 30.24	

Ext No.	Name	Address	Date Paid & Amount	Total Amount to Which the Witness Will Testify (1958)	(1959)
			4/16/59 $ 7.61		
			4/23/59 7.61		
			4/30/59 7.61		
			5/7/59 7.61		
			5/14/59 7.61		
			5/21/59 7.61		
			5/28/59 7.61		
			6/4/59 7.61		
			6/11/59 7.61		
			6/17/59 7.61		
			6/18/59 1.50		
			7/16/59 6.51		
			7/31/59 7.61		
			8/6/59 7.61		
			8/13/59 7.61		
			8/20/59 7.61		
			8/27/59 15.12		
			9/13/59 15.12		
			9/26/59 15.12		
			10/10/59 15.12		
			11/25/59 15.12		
			12/9/59 15.12		
			12/26/59 15.12		
5-31	Lillian Kahn	6335 N. Bell Ave. Chicago, Illinois	11/25/58 6.60		
			12/2/58 7.56		
			12/9/58 7.56		
			12/18/58 8.56		
			12/26/58 15.12		
			1/8/59 15.12		
			1/24/59 15.12		
			2/11/59 15.12		
			3/3/59 13.02		

[fol. 54]

Bis. No.	Name	Address	Date Paid & Amount	Total Amount to Which the Witness Will Testify (1958) (1959)
1835	Crayton M. Stobel	8529 Saturn Street Los Angeles, California	4/5/58 $ 5.20 4/19/58 3.66 4/26/58 5.76 5/17/58 12.00 6/16/58 6.00 11/3/58 7.56 12/1/58 15.12 8/28/58 4.90 8/21/58 6.51 8/12/58 6.71 7/31/58 6.51 7/24/58 10.00 7/16/58 10.51 6/30/58 6.12 6/9/58 6.06 5/24/58 6.06 5/10/58 6.06 4/12/58 6.16 5/2/58 6.06	
3874	Charles Kemmerer	1904 S. Prospect Ave. Park Ridge, Illinois	1/21/59 7.61 1/28/59 7.61 2/5/59 7.61 2/12/59 7.61 2/19/59 7.61 2/26/59 7.61 3/5/59 7.61 3/12/59 7.61 3/19/59 10.40 3/26/59 7.61 4/2/59 7.91 4/9/59 7.61	

[fol. 55]

Ex. No.	Name	Address	Date Paid & Amount		Total Amount to which the witness will testify 1958	1959
2490	Libby Hadler	6228 Whipple Street Chicago, Illinois	Unknown		60.00	125.00
2868	Herman A. Goldberg	3950 Lake Shore Drive Chicago, Illinois	"		30.00	
3516	Clarence Payne	7922 South Long Oak Lawn, Illinois	10-13-59	$60.48		
			11-23-59	28.14		
			12- 3-59	28.14		
			12-21-59	15.40		
2244	Gertrude Becker	6745 Mozart Chicago, Illinois	10-27-58	7.56		
			11-14-58	7.56		
			12-22-58	15.46		
			1-30-59	15.12		
			2-17-59	22.68		
1695	Gail Icho	7626 North Greenview Chicago, Illinois	1-13-59	10.92	130.50	
			2-14-59	6.72		
			4- 1-59	10.05		
			5-25-59	7.00		
			7-11-59	15.12		
			9- 1-59	17.64		
			12-16-59	21.84		

Bk. No.	Name	Address	Date Paid & Amount	Total Amount to Which The Alliance Will Subscribe (1998)	
b298	Estelle Siegel	8819 S. Crawford Skokie, Illinois	8-08-97 $ 7.95 3-03-98 7.95 7-11-98 8.12 7-07-99 13.51	$ 84.00	$ 48.00
8876	Ethel Levin	7250 S. Western Chicago, Illinois	Unknown	37.06	34.98
8897	Pearl Gold	8733 W. Berwyn Chicago, Illinois	"		
9813	George Zaremba	Warwick Apts. Atlantic City, N.J.	"		89.00
9814	Blanche Zaremba	Warwick Apts. Atlantic City, N.J.	"		89.00
8818	Muriel Horwitz	3906 Lake Street Skokie, Illinois	"	146.50	146.50
1602	Vivian Primerhein	6153 N. Lawndale Chicago, Illinois	"	90.00	90.00
1736	Gloria Tunick	3295 W. Arcadia Skokie, Illinois	"	86.00	86.00
3136	Hilda Rhinow	644 Oakdale Chicago, Illinois	10-06-99 19.18	179.80	
8865	Ronald Mikkelsen	9589 N. Grand Pk. Mt. Rokie, Ill.	Unknown	157.80	171.80
8876	Barbara Hisky	6097 N. Troy Chicago, Illinois	"	196.98	
8881	Elizabeth Cohen	8310 Kimball Skokie, Illinois	"		49.18
8882	Sylvia Freedberg	3917 Jarvis Chicago, Illinois	"		86.48

[fol. 57]

IN THE UNITED STATES DISTRICT COURT

Name of Presiding Judge, Honorable Hubert L. Will.

Cause No. 65 CR 464

U.S.A.

vs.

SIMMIE S. HORWITZ

ORDERS—November 29, 1965

Brief Statement of Motion—Ruling on pending motions and to set trial.

Notes—Order defendant's motions to dismiss the indictment denied.

Order defendant's motion for a bill of particulars granted, except as to particulars 4 and 29(b).

Order cause set for Jan. 3, 1966 at 2:00 P.M. to set trial.

IN THE UNITED STATES DISTRICT COURT

Name of Presiding Judge, Honorable Hubert L. Will.

Cause No. 65 CR 464

UNITED STATES OF AMERICA

v.

SIMMIE S. HORWITZ

ORDERS—December 3, 1965

Brief Statement of Motion—Motion to vacate court order of November 29, 1965 and grant leave to the government to file a memorandum in support of its motion.

Names and Addresses of moving counsel—Edward V. Hanrahan (R. G. Schultz), United States Attorney, 1500 Federal Office Building, 219 South Dearborn Street, Chicago, Illinois 60604

Names and Addresses of other counsel entitled to notice and names of parties they represent—Harvey M. Silets, 8 South Dearborn Street, Chicago, Illinois—Defendant

[fol. 58] Notes—Govt's motion to vacate court order of Nov. 29, 1965 and memorandum in support taken under advisement.

In the United States District Court

Name of Presiding Judge, Honorable Hubert L. Will.

No. 65 CR 432 & 65 CR 464

U.S.A.

vs.

Simmie S. Horwitz

Orders—December 7, 1965

Notes—Pursuant to memorandum opinion this day filed order Govt's motion to vacate certain portions of this Court's order of Nov. 29, 1965 denied with the exception of question 25(d).

IN THE UNITED STATES DISTRICT COURT

Name of Presiding Judge, Honorable Hubert L. Will.

No. 65 CR 432 & 65 CR 464

UNITED STATES OF AMERICA

vs.

SIMMIE S. HORWITZ

ORDERS—January 4, 1966

Brief Statement of Motion—Motion to dismiss Indictments.

Names and Addresses of moving counsel—Harvey M. Silets, Harris, Burman and Silets, 7 South Dearborn Street, Chicago, Illinois 60603

Representing—Simmie S. Horwitz

Names and Addresses of other counsel entitled to notice and names of parties they represent—United States Attorney, 219 South Dearborn Street, Chicago, Illinois Representing United States of America

[fol. 59] Notes—Defendant's motion to dismiss the indictments entered and contd to March 7, 1966 at 10:00 A.M.

IN THE UNITED STATES DISTRICT COURT

Name of Presiding Judge, Honorable Hubert L. Will.

No. 65 CR 464

U.S.A.

vs.

SIMMIE S. HORWITZ

ORDERS—March 7, 1966

Brief Statement of Motion—Motion for entry of an order directing the Govt. to furnish particulars, or, in the alternative, to dismiss indictment and to set trial.

Notes—Order Govt. to answer questions 14 and 25 of defendant's motion for bill of particulars, as originally requested, within 1 week. Order cause contd to March 14, 1966 at 10:00 A.M. to set trial.

IN THE UNITED STATES DISTRICT COURT

Name of Presiding Judge, Honorable Hubert L. Will.

No. 65 CR 464

U.S.A.

vs.

SIMMIE S. HORWITZ

ORDERS—March 14, 1966

Brief Statement of Motion—To set trial.

Notes—Govt refuses to answer question No. 25 of the defendant's motion for bill of particulars, as limited and as ordered by the Court. Defendant renews motion to dismiss the indictment and ruling on said motion reserved. Order cause contd to March 15, 1966 at 10:00 A.M.

[fol. 60]

IN THE UNITED STATES DISTRICT COURT

Name of Presiding Judge, Honorable Hubert L. Will.

No. 65 CR 464

U.S.A.

vs.

SIMMIE S. HORWITZ

ORDERS—March 15, 1966

Brief Statement of Motion—Deft's motion to dismiss indictment contd generally.

Notes—Enter order.

IN THE UNITED STATES DISTRICT COURT

Name of Presiding Judge, Honorable Hubert L. Will.

No. 65 CR 432

U.S.A.

vs.

SIMMIE S. HORWITZ

ORDER—March 15, 1966

Brief Statement of Motion—Deft's motion to dismiss indictment contd generally.

Notes—Enter order.

Will, J.

[fol. 61]

IN THE UNITED STATES DISTRICT COURT

No. 65 CR 432—65 CR 464

MEMORANDUM OPINION—December 7, 1965

The United States has moved to vacate certain portions of this Court's order of November 29 granting, with exceptions, defendant's motion for a Bill of Particulars. The government contends that our decision as to Questions 7, 14, 25, 28 and 29(a) is erroneous in the belief that it requires them to furnish a list of witnesses to the defendant and to divulge the whole of its case before trial. The government's characterization of our order is an overstatement and its suggestion that disclosure of the particulars sought will somehow prejudice the prosecution and defeat the interests of justice appears unfounded. With the exception of Question 25(d), which was inadvertently included in our prior order, the government's motion will be denied.

The proper scope of a bill of particulars is a question left largely to the sound discretion of the trial judge. Wong Tai v. United States, 273 U.S. 77, 82 (1927). See also, this court's opinion in United States v. Covelli, 210 F.Supp. 589 (N.D. Ill. 1962). The exercise of judicial discretion—in such matters as in all others—is necessarily shaped by the central elements of our system of justice. Contrary to the government's suggestion, the right of the defendant to remain silent and to have his guilt proved beyond a reasonable doubt does not generate a countervailing right which permits the prosecution to withhold information which the defendant requires in the preparation of his defense. The scales of justice are not balanced in such a manner. Rather, they are set to achieve a single, [fol. 62] all-important result: a fair trial in which the true facts can be ascertained.

Each of the questions the government seeks to strike ask for certain relevant names. The two indictments here

involved charge that the gross sales amount stated on certain tax returns subscribed by the defendant is incorrect. Question 7 asks the government to identify the various elements of their computation of gross sales, including the names of the various payors. Question 14 is similar, although particularly restricted to the possible use of the specific item method as the technique for determining unreported gross sales. Depending on the techniques actually used by the government, the answers to these questions may or may not be repetitious. They are, however, essential to identify the specific information the defendant will be called upon to answer and the problem of duplication is one easily cured by competent drafting. Question 25 deals with oral statements which the defendant is alleged to have made. The government is not required to disclose the substance of these conversations, but only the name of the person to whom the statement was made and the names of others actually present at the time. Question 28 asks if the government relies upon statements of persons other than the defendant and, if the answer is in the affirmative, 29(a) requests their names.

It is by no means clear that the names thus provided will be a list of witnesses to be called by the prosecution. That some may be called is obvious. However, it is equally obvious that not all must necessarily be called and customarily are not. Also equally obvious is the fact that others besides persons present at such times may be called as witnesses as, for example, agents who investigated transactions involving the defendant by interviewing the other parties thereto, accounting witnesses who testify to [fol. 63] computations made by them, etc. The reason for requiring disclosure of their names, however, is not that they will or may be witnesses, but that the defendant requires identification of the times, places and persons present in order to prepare his defense. Moreover, if the government has any basis for contending that such disclosure will involve physical risk to the individuals or prejudice the government in its ability to produce its evidence, they

have not so indicated. Absent such a showing, the defendant is entitled to have the information.

Moreover, with respect to the information underlying the government's analysis of economic data for such as gross sales, the notion that supplying the names of payors is the equivalent of a list of witnesses ignores the existence of modern trial techniques which simplify the presentation of such evidence. There will, of course, be instances where the identity of a party to the transaction will be of importance to the prosecution or defense and the individual's testimony essential to determine the nature of the transaction. However, in general, the bulk of such evidence is drawn from business records and accounts whose authenticity and substance is subject to stipulation between prosecution and defense. The uncontested testimony of numerous clerical employees, necessary merely to lay a foundation for the evidence, does not assist the trier of fact in reaching the correct determination of the ultimate issues. It more often obscures and delays, withdrawing the focus of attention from the central questions to be decided. Needless to say, such matters cannot be considered for inclusion in pretrial stipulations if they are withheld until the moment of trial.

Lest there be any misunderstanding, the court does not intend to require the government to specify the substance of its evidence or limit the scope of its proof at a subse- [fol. 64] quent trial. Counsel for the defense in the motion for a bill of particulars makes frequent use of the phrase "on which the government relies" or variations thereof. The court does not interpret this as seeking a disclosure of all the government's proof but simply to identify the information sought as that which the government deems relevant and material rather than all such information in the government's possession.

An order consistent with this opinion will be entered.

Hubert L. Will, Judge.

Dated: December 7, 1965

[fol. 65]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before Hon. John S. Hastings, Chief Judge, Hon. F. Ryan Duffy, Circuit Judge, Hon. Luther M. Swygert, Circuit Judge.

[Title omitted]

RULE TO SHOW CAUSE—March 24, 1966

On June 15, 1965, indictment No. 65 Cr 432 was returned to the District Court for the Northern District of Illinois, charging Simmie S. Horwitz with a violation of Title 26 U. S. Code § 7206(1);

On June 29, 1965, indictment No. 65 Cr 464 was returned to the District Court for the Northern District of Illinois, charging Simmie S. Horwitz with a similar but distinct violation of Title 26 U. S. Code, § 7206 (1). At subsequent proceedings, these two indictments have been considered on a consolidated basis;

On September 7, 1965, defendant filed a motion in the alternative for a bill of particulars. Thereafter, the Government filed an answer in opposition to defendant's motion for a bill of particulars;

On November 29, 1965, the District Court entered an order granting defendant's motion for a bill of particulars except as to 4 and 29(b);

On December 3, 1965, the Government filed a motion to vacate the Court's order of November 29, 1965, with respect to particulars 7, 14, 25, 28 and 29(a). This motion was denied, and the Government has filed answer to all questions contained in defendant's bill of particulars as directed by [fol. 66] the Court except questions 25 (a) (b) (c) (e) (f) and (g):

On March 15, 1966, on petition of the Government, this Court granted a stay of all proceedings until further order of the Court and granted the government leave to file its petition for mandamus to vacate the District Court's order directing the Government to answer certain items of the bill of particulars by March 21, 1966;

Petitioner, United States of America, citing *Bowman Dairy* v. *United States*, 341 U.S. 214, *Atlass* v. *Miner*, 7 Cir., 265 F.2d 312, 319 and *Miner* v. *Atlass*, 363 U.S. 461, and claiming the District Court has attempted to extend criminal discovery beyond the provisions of the Federal Rules of Criminal Procedure and the law, and protesting that under established law, the Government need not disclose a list of its witnesses to the defendant in advance of trial, has requested this Court to issue a writ of mandamus directed to Honorable Hubert L. Will, Judge of the United States District Court for the Northern District of Illinois, who signed the orders hereinbefore described;

And the Court being fully advised;

It Is Ordered, that the said Honorable Hubert L. Will, Judge of the United States District Court for the Northern District of Illinois, show cause within twenty (20) days of the date of this order, why a writ of mandamus should not issue from this Court ordering the said Honorable Hubert L. Will to vacate the Court order signed by him directing the Government to answer question 25 contained in defendant's motion for a bill of particulars; and

It Is Further Ordered, that pending the decision of this Court on the issues hereinbefore stated, the United States of America need not answer Question 25 contained in defendant's motion for a bill of particulars.

[fol. 67] [File endorsement omitted]

[fol. 68]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 15607

UNITED STATES OF AMERICA, Petitioner,

vs.

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois, Respondent.

Petition for Writ of Mandamus

Supplemental Appendix—Filed May 3, 1966

[fol. 69]

TRANSCRIPT OF PROCEEDINGS—November 29, 1965

had in the above-entitled cause before the Honorable Hubert L. Will, one of the judges of said court, in his courtroom in the United States Court House at Chicago, Illinois, on Monday, November 29, 1965, at the hour of 10:00 o'clock a.m.

APPEARANCES:

The United States Attorney, by Mr. Richard Schultz, Asst. U. S. Attorney, on behalf of the Government;

Mr. Ira M. Burman, on behalf of the Defendant.

The Court: All right. Then I don't have any difficulty at all. I will deny the motions to dismiss the indictment

on the various grounds stated. I will write a short memorandum of opinion on it.

Now with respect to the bill of particulars, I think you ought to get most of that. The only things which it seems to me are not appropriate, you ask in specification No. 4 of the Bill, you want to know what act the defendant did on June 16, 1959.

That is a legal conclusion. I don't think the government has to, in a bill of particulars, give you a legal theory as to what act or acts the defendant did. I am not sure the defendant has to do any act, as I have just indicated. The defendant can do an act on one day and the effect of the act can be felt on a subsequent day, and that completes the crime. If I send something in the mail which explodes two days later in somebody's home, I may nevertheless be guilty [fol. 70] of homicide even though I didn't do a thing that day except stay in church all day.

I don't see that that has any relationship to this. It is a legal question solely. Now that is No. 4.

Now with respect to No. 29, they ask, if I read it correctly, the substance of statements of other persons, that is, persons other than the defendant. I think they are entitled to know if you took statements from other people, but I don't think they are entitled to have the actual statements of other people until such time as they become witnesses in the case, and then they are entitled to them under 3500. That they have taken statements of other people, I think you are entitled to know that.

COLLOQUY

Mr. Schultz: The names of the persons, your Honor?

The Court: That is right, names of the persons so that they can consult with the people if they desire to see what they have said.

Mr. Burman: That is satisfactory.

The Court: That is appropriate information, but what is contained in the statements, I think you are not entitled to that, or to the statements themselves.

Mr. Schultz: They will have a list of our witnesses that way, your Honor.

The Court: They may or may not, I don't know.

Mr. Schultz: They will.

The Court: Some of them, certainly, no question about that.

Mr. Schultz: They will have a list of all of them and perhaps some other people whose names we put on the list who we will not be calling as witnesses.

[fol. 71] The Court: They may have some people who are not going to be witnesses, and they may have some people who are witnesses who are not on the list. You may not have statements from all of them. I don't know. I have seen an awful lot of witnesses who get on the witness stand here in criminal cases, and when we ask if they have any 3500 statements, government counsel says, no, they don't have 3500 statements for this witness. So I don't conceive that the two are the same or identical or—

Mr. Schultz: When the Internal Revenue makes an investigation, your Honor, they get statements from every witness they are going to call, so we will be giving them a list of witnesses in answer to this interrogatory.

The Court: You may. You may. I don't see any harm in it unless you want to tell me that there is some reason to believe that the disclosure of these witnesses would result in some adverse consequences to the witnesses or to their testimony in this case, and you better have some showing as to why it would. If you don't have that, I don't see any reason for being secretive about who your witnesses are.

Mr. Schultz: I think, your Honor, with regard to this, we would like to have some time to consider that motion.

The Court: What do you mean? What are you going to consider? I have just ruled. Do you mean consider whether you will comply with my ruling?

Mr. Schultz: Your Honor, I didn't mean to say it that way. We would like to consider whether or not we have this problem as to whether or not by disclosing the names

of the witnesses, the persons' testimony might be altered, or what have you.

[fol. 72] The Court: If you make a showing that that is a problem, I will reconsider the ruling. But in the absence of such showing, and there is none in the memorandum you have filed so far—

Mr. Schultz: We haven't had an opportunity to make any statement on that point.

The Court: Right, but in the absence of any such statement, I don't see any reason for not disclosing the names of people from whom you have taken statements.

All right. With the exception of 4 and 29 in the specifications, I think you ought to answer, subject only to this possible motion for reconsideration in the light of a showing—I don't mean an allegation, I mean a showing—that there is reasonable ground to believe that disclosure of the names—you better specify the people.

Mr. Schultz: Yes, your Honor.

The Court: I can't conceive of any problem with the statements of revenue agents. I can't believe that their testimony is going to be adversely affected by disclosure of the fact that they have made statements, for example. On the other hand, it is conceivable that a lay witness, a citizen witness, if you have some grounds—some grounds.

Now, what about setting for trial?

Mr. Burman: Would it be possible to set it for early spring?

The Court: Early spring? It never occurred to me that this case would still be around here in early spring.

Mr. Burman: Well, Mr. Silets has a couple of matters, one pending in the Supreme Court, and it would be difficult to prepare for it prior to spring.

The Court: How soon will the government be ready?

Mr. Schultz: Your Honor, first I would like to state that [fol. 73] we understand there will be a motion to suppress in this case. I know you generally hear that just before the trial.

The Court: Yes, at the time of trial.

Mr. Schultz: In this case probably there will be six or seven witnesses altogether. It will take some time.

The Court: Fine. We will hear them at the time of trial.

Mr. Schultz: It will take the government perhaps a week to prepare the case. So any time with a week's notice we can be ready.

The Court: It will take you a week to get them the answers to the bill of particulars, and they are entitled to a little time thereafter to look at it.

Mr. Schultz: Yes, your Honor.

The Court: I will set this then to set for trial on Monday, January 3rd, at two o'clock, and I will expect to try it reasonably shortly thereafter.

Mr. Schultz: How much time, your Honor, will the government have to answer the bill of particulars?

The Court: I think the rules give you fifteen days, don't they?

Mr. Schultz: Thank you, your Honor.

The Court: I am not sure of that. If they give you twenty days, you have twenty. If they give you ten days, you have ten.

Mr. Schultz: We will check the rules.

Mr. Burman: When will we know about this one objection?

The Court: I take it you will know within the period of time in which the government is required to answer.

Mr. Schultz: Yes, sir.

[fol. 74] Reporter's Certificate to foregoing transcript (omitted in printing).

TRANSCRIPT OF PROCEEDINGS—December 3, 1965

had in the above-entitled cause before the Honorable Hubert L. Will, one of the judges of said court, in his courtroom in the United States Court House at Chicago, Illinois, on Friday, December 3, 1965, at the hour of 10:00 o'clock a.m.

APPEARANCES:

The United States Attorney, by Mr. Richard Schultz, Asst. U.S. Attorney, on behalf of the Government;

Mr. Harvey Silets, on behalf of the Defendant.

The Clerk: 65 CR 432 and 65 CR 464, United States of America versus Simmie S. Horwitz, motion to vacate court order of November 29, 1965 and grant leave to the government to file a memorandum in support of its motion.

COLLOQUY

Mr. Schultz: This is a motion by the government asking that the Court reconsider its order that the government [fol. 75] answer questions 14, 25, 28 and 29(a) of the defendant's bill of particulars in this case. You might recall, your Honor, we were ordered to answer all of the questions except 29(b) and question 4. The grounds for our motion, your Honor—

The Court: Where does question 25 say you are to give them the names of the witnesses? It says names of people who engaged in conversations, whether or not they are witnesses. You have inserted that they are witnesses.

Mr. Schultz: "Upon which we rely."

The Court: You have inserted that they are witnesses.

Mr. Schultz: Upon which we rely. If we rely on them to support our charge, they are going to testify. If we don't rely on them, they won't.

The Court: They may or may not. I assume that some will and I suspect that some won't.

Mr. Schultz: Your Honor, in any event we will be giving the names of all of the people who will testify because we are relying on them, and consequently we are giving a list of witnesses.

The Court: I don't know whether you are. I take it there can be people who can testify who never had conversations with the defendant. Every time you put an agent on who makes computations, he never talked to the defendant. He is just a witness called by the government to prove part of the government's case to the extent that he is responsible for it.

Mr. Schultz: No, your Honor, we have that question, too. It is not only those conversations on which we rely, but all witnesses on which we rely. There are different questions. We are asking that both of them not be answered. [fol. 76] In either event we are going to be giving all of our witnesses.

In answer to one question, it is those witnesses who testify as to the conversations of the defendant, and in answer to another question it is those witnesses upon which the government relies in supporting its case. The second question encompasses the first, and there are additional witnesses that we will have to set forth in the second question.

It is our position, your Honor, that the law does not require us to give a list of witnesses except in a capital case or treason case.

The Court: I don't follow you. You know, you cited me Judge Learned Hand who talks about giving evidence. Nobody is proposing that you give the evidence. It is proposed that you give them the names of the people and they can go out and interview them and determine what, if anything, these individuals are going to say. They are not asking you to give the evidence.

Well, I will take a look at it. I am not going to grant the motion. Do you want to file a memorandum in response, Mr. Silets?

Mr. Silets: I received the motion and memorandum this morning, your Honor, but I prefer to rely on our prior briefs and the Court's prior ruling.

I am just somewhat upset about this proliferation of the briefs and motions and so on. Once the Court rules contrary to the government, the government feels obliged to file additional briefs and motions.

The Court: Well, Mr. Silets, it is no secret that the government is disturbed that I am making available to defendants the identity of people who are alleged to have been [fol. 77] present when transactions took place, which the government contends are illegal. I must confess I have difficulty understanding why that is something the government should keep hidden from defendants who are supposed to defend against their guilt in connection with the transactions in question.

But the government has been disturbed ever since I came over here that I was being unduly helpful to defendants by having the government identify people who were supposed to have been there when the crime took place. I can't quite understand why that is unwarranted disclosure on the part of the government, but I recognize that the prosecution feels that it is helpful to them to the extent that they can keep their case secret, and that the law does not require that they disclose their evidence. I have never required them to disclose their evidence, but I have required them to identify the people with whom the defendant is supposed to have participated in an illegal act but who were present.

I get the same motion in opposition, I get the same brief in opposition to a bill of particulars every time. I must have examined fifty of them by now. They never tell me anything more than the last one told me; that is, the government doesn't want to give this information because it will disclose its witnesses.

I say maybe they will be witnesses and maybe they won't, and I see time and time again, an informer doesn't show

up as a witness in a narcotics case or another kind of a case, a tax case, and I am told if we give them his name, we will be giving the name of a witness.

There is not much I can do about it except to continue to apply what I conceive to be the minimum concepts of [fol. 78] necessary disclosure in a motion for a bill of particulars to enable a defendant to defend against—not to make the government disclose its case, but give the defendant a reasonable opportunity to know what he is charged with, who was present, where it took place, what time of the day or night it took place, and then let the defendant go out and interview the people if he so desires and see what they are going to say.

Mr. Schultz: Your Honor, may I state there are thirty questions in the bill of particulars. We have drafted an answer of about twelve pages. We are going to redraft it. Among these questions which we have already answered and which we will ultimately answer, we are to list the bank accounts upon which we are relying and give our analysis of the bank accounts, that is, which is a transfer of funds, which entry is a deposit of unreported gross receipts and what isn't.

This certainly is the work product of the government. We have been ordered to answer that and we are not complaining at this time—we are not complaining at all, but certainly this is advising the defendant of his rights.

We are asked to answer among these questions, what money the defendant personally got. The charge here is false subscription of a corporation tax return. What money the defendant got is totally immaterial, totally irrelevant. What acts the defendant did upon which we are relying, time of the act, place of the act, nature of the act—this is the general gist of all the questions.

The Court: That is not irrelevant, the time and the place of the act.

Mr. Schultz: I am not saying that is irrelevant, your Honor.

[fol. 79] The Court: If that isn't relevant, nothing is relevant. There is no crime if that isn't relevant.

Mr. Schultz: We are certainly advising him of what the charge is and what the case is going to be, what our presentation of the case is going to be. He is getting more than enough information. He has thirty questions like this, your Honor.

The Court: I will take a look at your motion and your brief. If I conclude that there is anything in my order which is inherently prejudicial to the government or unfair, I will revise it, but my initial reaction is that telling a defendant who it was you saw him do or heard him do or participated with him in an act which is charged as a violation of the law is not unfair disclosure of the government's position or of the acts which the defendant is being required to answer for. Well, I will take a look at it.

Mr. Schultz: Would your Honor set it for another date?

The Court: No, I will just rule. I will take a look at it. Mr. Schultz, you are going to file an answer to some of the questions. You are simply asking that 14, 25, 28 and 29(a) not be answered at this time, and that I amend my order with respect to those.

Mr. Schultz: There is one additional question, which I don't know the number right at the moment, which is similar to question 14, which we are also objecting to, which we made reference to in our proposed answer of the bill.

The Court: You haven't listed it in the motion?

Mr. Schultz: No, your Honor. We found later it was almost an identical question to 14, and in our proposed answer we say refer to our motion.

The Court: What am I supposed to rule on?

[fol. 80] Mr. Schultz: We will file this probably Monday. You will have a copy of this by Monday.

The Court: I am not going to rule on that. I am going to rule on a motion which you filed with respect to questions 14, 25, 28 and 29(a), and that is all. If you want me to rule on some other question, you better include it in the motion. Mind reading I don't do.

Mr. Schultz: May I give you the number, then, your Honor, or should I file it?

The Court: You better give me the number.

Mr. Schultz: It is question No. 7.

The Court: You want me to add 7 to this?

Mr. Schultz: Not the whole question, your Honor, just the part which requires us to give the names, addresses, and so on.

The question is: "In describing the items requested in Request No. 6, state the date received, the gross amount, the name and address of from whom received, and the nature, amount and date paid."

We say that again—

The Court: The name of from whom received should not be disclosed? Doesn't it follow automatically if you tell them the date of the payment and so forth? What is the difference? You know it just saves him going back and correlating all of these things with the identity of the payor, doesn't it?

Mr. Schultz: Yes. If we give him the date, he can correlate it to the name.

The Court: You have it. It is easier to put it down than have him going through documents to track down to see the name of the payor.

[fol. 81] Mr. Silets: It may not even be possible for us to track it down.

The Court: It is conceivable that you couldn't tell from whom it came.

Mr. Silets: That is right.

Mr. Schultz: Certainly if a witness testifies, your Honor, that they paid X number of dollars, and we can show that that money was not reported—

The Court: Why is this such a great secret?

Mr. Schultz: Your Honor, the law does not require us to make this disclosure.

The Court: I don't know whether the law requires it or not. The law says you are to disclose such information as

is necessary to enable the defendant adequately to prepare his defense.

I would think that the identity of a person alleged to have made payments to the defendant which were not reported in the income tax return, the identity of such a person is part of the information which the defendant will need in order to be able to adequately prepare his defense. You may have some judges who disagree with me, but this is certainly within the area of judicial discretion. But if I were defending this case, I would think it was necessary to know who it was who allegedly paid.

You know, I have tried a number of income tax cases here. You bring in Mr. so and so who says I gave Mr. X $6,000 in 1960 for legal services, and then he is asked on cross examination, "Wasn't it a loan?" and so forth.

In order to defend the case you have to find out who the people are so you can prepare whatever the defense may be. But I must confess to you I don't see where the government can be prejudiced, except as it hopes by last-minute [fol. 82] disclosure to preclude the defendant from preparing an adequate defense. I don't see how the government can be prejudiced by disclosing the identity of a person who made payments to the defendant which allegedly the defendant did not include in his income tax as reported to the government. What is the defendant going to do? Go around and get the fellow to say he didn't make the payments? You have evidence of the payments. What is he going to do, hand him a post-dated note in which he says he is going to pay it back?

Mr. Schultz: Even in treason cases where the government has to give a list of witnesses, you don't have to give it until three days before the trial.

The Court: I am not talking about giving a list of witnesses.

Mr. Schultz: That is exactly what we would be giving, your Honor.

The Court: Mr. Schultz, you are not going to persuade me that you could make somebody who is a participant in

an act which is alleged to be the crime, a hidden character, a Mr. X, just by saying we are going to call him. I don't understand where the government gets the right to hide its witnesses or, the other way around, to say that they will not disclose the identity of a person who participated in an act which the defendant is charged with having done illegally by saying we are going to make him a witness. I don't follow that.

I have said in cases where there was any suggestion that the disclosure of the identity of the witness would prejudice the witness physically or otherwise or prejudice the presentation of the government's proof, that is another matter. [fol. 83] That is another matter. I told you that the other day.

Mr. Schultz: Yes, you did, your Honor.

The Court: If you have any witnesses here whom you are prepared to say have a legitimate basis for concern with respect to their physical safety or with respect to the testimony they will ultimately give, I will hear that in a minute. I will hear that in a minute, but other than that, simply to say we don't want to disclose these names because we think this will enable the defendant to interview these people and find out what they are going to testify and thereby attempt to make a reasonable defense to it—that is what you're supposed to be able to do. He is entitled to make a reasonable defense to testimony of witnesses who are going to testify against him.

You know, I have great concern that in a civil case we require both sides to submit their witnesses to maximum deposition when all that is involved is money. In a criminal case, the government doesn't even want to disclose the name of a person so the other side can go out and interview him when what is concerned is life or liberty. To me this is a very strange aberration of the processes of justice as between civil and criminal cases. When all that is involved is money, we say put your cards on the table. Where life and liberty are involved, we say to the prosecution you don't have to tell him a thing.

Mr. Schultz: Your Honor, I submit the reason for the distinction is because in criminal cases, since there is much more at stake, as you point out, life and liberty, there is more chance, more reason to construct a fabrication once you know what the other's case is than in a civil case.

[fol. 84] The Court: Mr. Schultz, if the government doesn't have a sufficient case so that it will stand the light of day before trial, it ought not bring the case. It ought not bring the case. If it has to get one by because if it were examined carefully and thoroughly it would be disclosed not to have substance, then the case should not be brought.

Now any evidence of a fabrication, believe me, we will deal with it. The laws of perjury—we have had convictions for perjury here, and we will have them again, I have no doubt, arising out of criminal cases, but I am not prepared to say to a defendant that you may not have the information which it seems to me you reasonably require to prepare your defense because I am afraid you or somebody helping you will lie and we won't be able to do anything about it.

Mr. Silets: I am not even sure that Mr. Schultz is going that far to suggest that the defendant in this case or his attorneys would fabricate a defense.

Mr. Schultz: Certainly I am not suggesting the attorneys would fabricate a defense.

Mr. Silets: Is he suggesting the defendant would?

Mr. Schultz: We are not only talking about this very case, your Honor.

The Court: Well, I am talking about this case. That is what I am ruling on. That is what I ruled on last week or earlier this week. That is what you are asking me to reconsider, to vacate.

Mr. Schultz: My statement of a moment ago was not—

The Court: I told you that any time you made a representation with any foundation in support of it that the disclosure of the name of an individual would either jeopardize him physically or jeopardize the government's proof [fol. 85] in the case and that his testimony might be altered

or effort might be made to persuade him not to testify, or something else, I am prepared to say under those circumstances of that showing we don't risk people's lives or their security, their physical well-being, and we don't encourage any possible circumstances in which testimony can be suppressed. That is consistent, it seems to me, with my general philosophy that you shouldn't be suppressing things; and if there is a threat of suppression then I will take the lesser suppression to prevent the greater.

Mr. Silets: I can assure your Honor in this case Simmie Horwitz, the corner druggist, is not going to attempt the lives of the witnesses here.

Mr. Schultz: Your Honor, just one last statement, and that is in your view, which is a rather liberal, enlightened view, perhaps, wasn't even adopted in the proposed new rules of discovery under the criminal rules by the American Bar Association.

The Court: Well, it was and it wasn't. If you want to get into that discussion it will take a long time because I have read them. I would go further than they go, but they certainly go a lot further than you—a lot further.

Mr. Schultz: They would not require the answers to these questions.

The Court: I don't agree with that. They would not require the giving of a list of witnesses, and I don't conceive that I am, though I recognize some of these may be witnesses. I don't conceive this to be a list of witnesses. [fol. 86] The government is not bound by this list. They can put people in who are not on the list.

In a civil case you give a list of witnesses and you can't call a man to the stand unless he is on the list of witnesses. I have never proposed that in a criminal case, though logically it seems to me there is a reason to say if this is legitimate in a civil case where nothing but money is at stake, why not require the government to put the witnesses on in a criminal case where liberty and life may be at stake.

I have never proposed that. I say you should disclose people who were present, whom you say were present when the illegal act was committed, and that is all.

Well, I will look at your motion.

Mr. Schultz: Thank you, your Honor.

Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 87]

TRANSCRIPT OF PROCEEDINGS—January 4, 1966

had in the above-entitled cause before the Honorable Hubert L. Will, one of the judges of said court, in his courtroom in the United States Court House at Chicago, Illinois, on Tuesday, January 4, 1966, at the hour of 10:00 o'clock a.m.

APPEARANCES:

The United States Attorney, by Messrs. Richard Schultz and Robert A. Galbraith, Asst. U. S. Attorneys, on behalf of the Government.

Mr. Harvey M. Silets, on behalf of the Defendant.

The Clerk: 65 CR 432 and 65 CR 464, United States of America versus Simmie S. Horwitz, to set trial, and motion for entry of order directing the Government to furnish particulars, or, in the alternative, to dismiss indictments.

COLLOQUY

Mr. Schultz: Your Honor, the government has just tendered to opposing counsel and filed with the Court our amended answer to the bill of particulars.

Our office and the Department of Justice have been consulting with regard to the Court's order requiring us to answer questions on the bill, and at this time I want to state to the Court that the government respectfully refuses to answer questions 14, 25 and 29(a).

The Court: What are 14, 25 and 29(a)? I don't even remember at this stage of the game.

Mr. Silets: Your Honor, perhaps it would ease the Court's review of this if I hand you a copy of the motion for bill of particulars.

[fol. 88] The Court: Yes. Now, what is the objection to 14?

Mr. Schultz: Your Honor, in answer to question 14 we would be giving a list of a substantial number of the government witnesses. Also in answer to 25 and 29, we would be giving also lists of our witnesses. In fact, we would be giving all of our witnesses, and that is our objection, your Honor.

Mr. Silets: Your Honor, I might say that the Court has thoroughly reviewed this, both in the opening phase in support of the original bill and upon the government's motion to vacate the order of November 29th. Your Honor has filed a comprehensive opinion wherein the same objections were reviewed by the Court and denied.

The Court: I refused 29(b), didn't I?

Mr. Schultz: Yes, sir.

The Court: Which was the substance of the statements?

Mr. Galbraith: That is right. This is directed only to 29(a), your Honor.

The Court: Right.

Mr. Galbraith: The same with 25(d). You did not require us to answer that.

Mr. Schultz: Which was the substance of the statements.

The Court: 25(d) the substance of the statement.

Mr. Schultz: Yes, sir.

The Court: Now what do you want, Mr. Silets?

Mr. Silets: Well, if they are going to refuse, your Honor, I might make one of two suggestions to the Court:

First, as far as the defendant, Simmie S. Horwitz, is concerned, we would prefer to see the indictments dismissed. In the alternative, I suppose the United States Attorney has failed to comply with the order of this Court, [fol. 89] and that a rule to show cause be issued as to why they should not be held in contempt.

As far as we are concerned, I prefer to see the indictments dismissed. The Court has reviewed this thoroughly, the Court has handed down its memorandum opinion reviewing the specific issues and has denied the government's contentions.

I might say that if a defendant were to take this arbitrary position in light of the Court's order, severe punishment might prevail upon him. I don't ask that the United States Attorney be sent to jail. I suggest only at this moment that the indictments be dismissed, but if the Court does not see fit to do that, that perhaps a rule to show cause be issued.

The Court: Well, I don't conceive that this is a basis for dismissing the indictments as such.

Mr. Silets: Your Honor, I tried to conclude as to what alternatives the Court has—

The Court: I think I will just postpone trial of this case indefinitely.

Mr. Silets: That is all right with us, your Honor.

The Court: Next case.

Mr. Schultz: Thank you, your Honor.

Mr. Silets: Thank you, your Honor.

Before Judge Will, Tuesday, January 4, 1966, 2:00 o'clock P.M.

PRESENT:

Mr. Schultz, Mr. Galbraith.
Mr. Silets.

[fol. 90] The Clerk: 65 CR 432 and 65 CR 464, United States of America versus Simmie S. Horwitz, defendant's motion to dismiss indictments.

The Court: I thought I ruled on this this morning.

Mr. Silets: Your Honor, when this motion was made this morning, your Honor indicated you thought you had no authority to dismiss the indictment.

The Court: No. No, I didn't say that. I said I was not prepared to dismiss the indictments for failure to comply with the motion for bill of particulars or an order for bill of particulars in this respect, in this area. I think I could dismiss it.

Mr. Silets: Yes, sir. As I pointed out in this motion, there are two Supreme Court decisions, one coming out of this district, right in point, which says that the court has the authority and should dismiss the indictment if the government refuses to comply with the direction in the bill of particulars.

The other aspect of my motion, your Honor, is this: that the net effect of the court putting this matter on an indefinite status is that the defendant is going to be subjected really to an indefinite term in the sense of not knowing when his cases, if ever, will go to trial, and that rests, as I understand it, on the discretion of the United States Attorney.

We have indicated as an alternative basis of the motion that the indictments be dismissed for want of prosecution as a violation under the Sixth Amendment of the Constitution, depriving the defendant to a speedy trial. We feel that once we get these particulars, within a reasonable length of time we will be prepared to go to trial, after having interviewed these people and prepared our defense. [fol. 91] But the net effect of the government's persistence in refusing to comply with the Court's order is that we will never know when, if ever, we are going to go on trial, and certainly we can't be said to have a speedy trial.

The Court: Well, Mr. Silets, I guess you are going to have to mandamus me because I am not going to dismiss the indictments, even though I think the government should answer those particular inquiries, and I am not going to proceed to try the case until the information is forthcoming.

I will take another look at it in sixty days, something of that sort, but unless the information is produced, I am not going to proceed to trial on the cases and I am not disposed to dismiss the indictments at this point. I may later.

I may later, if the government persists in its refusal to answer the bill of particulars, I may then dismiss the indictments.

Instead of continuing it indefinitely, let's continue it for sixty days and we will see where the government stands at that point.

Mr. Schultz: Thank you, your Honor.

The Court: If they stand where they are now, I may dismiss the indictments at that point.

Mr. Silets: Would that be a specific date?

The Court: Yes, sixty days from today, which will be—we will make it Monday, March 7th.

Mr. Silets: Thank you, your Honor.

Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 92]

TRANSCRIPT OF PROCEEDINGS—March 7, 1966

had in the above-entitled cause before the Honorable Hubert L. Will, one of the judges of said court, in his courtroom in the United States Court House at Chicago, Illinois, on Monday, March 7, 1966, at the hour of 10:00 o'clock a.m.

PRESENT:

Hon. Edward V. Hanrahan, United States Attorney, by Mr. R. G. Schultz, Asst. U.S. Attorney, on behalf of the Government.

Mr. Harvey M. Silets, on behalf of the Defendant.

The Clerk: 65 CR 432, United States of America versus Simmie S. Horwitz, and 65 CR 464, United States of America versus Simmie S. Horwitz, motion for entry of an order directing the government to furnish particulars, or, in the alternative, to dismiss indictments, and to set for trial.

The Court: What is the problem?

Mr. Silets: Well, your Honor, I think we are in the precise position that we were sixty days ago. On several occasions I have asked the government to furnish the par-
[fol. 93] ticulars, and they have indicated to me their position will be the same, that they will not furnish them. So I have renewed the motion that I made sixty days ago, that that the government either furnish them or that the Court dismiss the indictments.

The Court: Let's find out. Mr. Schultz, is it the government's continued position that this information they are not going to produce?

Mr. Schultz: Yes, your Honor.

The Court: This is information which, as I understand it, relates to the basis on which the government charges that there was unreported income. That is the issue, isn't it?

Mr. Silets: Yes, it is.

The Court: And you are not going to tell the defendant what it is that you base your claim of unreported income on, is that right?

Mr. Schultz: No, your Honor. The questions that we have refused to answer ask for the names and addresses of witnesses who will testify—

The Court: No. It asks for the names and addresses of people who paid the defendant something upon which you base the charge of unreported income, isn't that right?

Mr. Schultz: There are three questions. That is the first question.

The Court: Right, and that you refuse to answer?

Mr. Schultz: Yes, your Honor.

The Court: You are not going to tell them who the people are who were the source of unreported income which you charge him with criminally having failed to report, right?

Mr. Schultz: Yes, sir.

[fol. 94] The Court: Okay. Now what is the second one?

Mr. Schultz: That is Question 14, your Honor. The next question, Question 25, refers to 24, and 24 says: "Does the government rely upon any oral statements of the defendant to support the charge in the several counts of the indictments?"

The Court: What was your answer to that?

Mr. Schultz: Yes. I believe the answer was yes, your Honor.

The Court: You rely on some sort of oral admissions of the defendant?

Mr. Schultz: Yes, your Honor. I believe we answered yes.

Question 25 is: "If the answer to Question 24 is in the affirmative, state with respect to each statement if there was more than one (a) the name and address of the person to whom the statement was made, the date upon which the statement was made, the place where it was made."

Your Honor ruled that we do not have to answer the next question which is the substance of the statement.

The next question is—

The Court: But you do have to identify the circumstances under which it was allegedly made. As a matter of fact, the more I think about it I don't know why I didn't have you answer what the substance of it was, too.

Mr. Schultz: I believe you did order us to answer that and then you amended that, vacated that order later, your Honor.

The Court: I was very generous. It seems to me if you have a confession or admission, you ought to tell them what the substance of it is as well as tell them the time, place and person to whom it was made.

[fol. 95] You are now not going to do that either, as I understand it, right?

Mr. Schultz: Your Honor ruled that we didn't have to do it.

The Court: No. No, I am talking about the time, place and persons to whom it was made.

Mr. Schultz: No, we have not done that, your Honor.

The Court: Right. I didn't rule you didn't have to do that. I ruled you did have to do that.

Mr. Schultz: Yes, your Honor, you did.

The Court: Right. All I did was make the mistake of telling you that you didn't have to tell them what the substance of the alleged confession or admission was.

Mr. Schultz: Yes, your Honor.

The Court: So far I have made one error on the side of the government. Now what is the third category?

Mr. Schultz: There are some more questions under that one. Briefly they are whether the person to whom the statement was made was a government agent at the time of the statement; the names and addresses of any other persons present at the time the statement was made; and the last part of the question is whether any written memorandum or verbatim transcript was prepared and where it is.

The Court: These are admissions which you intend to use at the trial?

Mr. Schultz: Yes, your Honor.

The Court: You are not going to tell him what they were, to whom they were made, the circumstances under which they were made, the time, place, anything else, right? You are going to let him guess about what these confessions are that you are going to use at the trial, right?

[fol. 96] Mr. Schultz: They are not confessions.

The Court: What is an admission but a confession?

Mr. Schultz: Yes, sir.

The Court: So at this point you are not going to tell him who the persons were who were the sources of the alleged unreported income; two, you are not going to tell him what confessions were made and under what circumstances they were made.

What is the third category?

Mr. Schultz: The third question is Question 29, which relates to Question 28. Question 28 is: "Does the government rely upon the statement of any person other than the defendant to support the charge in the several counts of the indictments?"

The answer to that, your Honor, was yes.

Question 29 is: "If the answer to Request No. 28 is in the affirmative, state with respect to each such person if there was more than one, (a), the name and address of each such person or persons—"

The Court: These are people from whom written statements were taken?

Mr. Schultz: Statements, your Honor.

The Court: I take it that means written statements.

Mr. Schultz: Well, it doesn't say, your Honor. It doesn't say at all.

The Court: Let's assume it says written statements for the purposes of discussion. I take it, Mr. Silets, you are prepared to deal with written statements.

Mr. Silets: Yes, I am, your Honor.

The Court: Right.

Mr. Schultz: First of all, there is no indication—

[fol. 97] The Court: I am telling you now that I will order you to produce only written statements.

Mr. Schultz: A statement written by the prospective witness—

The Court: Or signed by him. I don't care who writes it. The mechanics don't interest me. The question is whether he signed it or not. These are statements now of people who have, I take it, made incriminating statements with respect to the defendant, right?

Mr. Schultz: Statements upon which the government relies to support the charge in the indictment.

The Court: Which are going to be introduced at the trial. We are talking about statements to be introduced at the trial.

Mr. Schultz: Your Honor, as I stated before—

The Court: I take it these are 3500 statements which will have to be produced at the trial in any event, won't they?

Mr. Schultz: Yes, your Honor.

The Court: Fine.

Mr. Schultz: Let me say that we have previously discussed this, and I explained to your Honor this being an Internal Revenue case, the investigation conducted by special agents, I represented to the Court that except possibly in the case of an accountant, we have statements signed by every witness who will testify for the government.

The Court: These you will have to produce at the trial under Rule 3500?

Mr. Schultz: Yes, your Honor. I imagine so. I can't think of any right now that would not be produced. All statements, all memoranda that we have, will be produced as each witness testifies, but this would include, your Honor, [fol. 98] the list of every witness who is going to testify.

The Court: I don't know whether it would or not.

Mr. Schultz: Except for an accounting expert.

The Court: You tell me that it would, but certainly I know—you say the expert is going to give the summarization, tabulation, computation, and so forth, and isn't going to give you a statement, and you are not going to identify him. But you say there is nobody else who will not be identified as a result of this because you have statements from everybody?

Mr. Schultz: Yes, your Honor.

The Court: That is the coincidence of this kind of a case, I take it. Well, I think, Mr. Silets, I am going to give the government one final chance. With respect to the statements which are in the nature of 3500 statements, I am not going to order them produced at this time.

Mr. Silets: Your Honor, I think the Court has already ruled that one of the requests was for the substance of the statements—

The Court: And I have said that that wasn't—

Mr. Silets: Right, and all your Honor directed was to give the names and addresses of the persons.

The Court: Right. I am going to back off of that just to keep the record clear because if they don't give the information that I think you are entitled to, I am going to dismiss the indictments, and I want to have no question about the propriety of the dismissal.

Mr. Silets: Yes, your Honor.

The Court: So I am going to order them to produce all admissions or confessions of the defendant orally or in writing that they are going to rely upon, give the infor-
[fol. 99] mation that is involved there. Whether it is an oral admission or confession or written admission or confession, you are going to produce them or give the information which is requested with respect to them, and you are going to identify the names of the individuals whose payments to the defendant you contend is unreported income upon which the criminal prosecution is based. You are not required to give what are in the nature of 3500 statements which would be produced at the trial.

Now, is the government's position that you will not give any of that information?

Mr. Schultz: No, I am not sure of that, your Honor. May I—

The Court: It has been your position so far, and I want to find out.

Mr. Schultz: No, your Honor. As I understand it, your Honor—

The Court: I have now told you to answer 14.

Mr. Silets: And 25.

The Court: 14 and 25.

Mr. Schultz: As I understand the answer to 25, the government is to give the names and addresses of the persons to whom the statements were made.

The Court: And the substance of the admission.

Mr. Schultz: And the substance of the admission?

The Court: Right. If this is a confession which you say was an incriminating confession, he is entitled to know what the substance of his confession or admission is.

Mr. Schultz: Your Honor, if they were not made to a government employee, would you consider them to be an admission?

[fol. 100] The Court: I take it that they are an admission without regard to whom they are made. An admission is an admission. Some of them are privileged and some aren't.

If I tell my lawyer I did something, that is privileged. If I tell my business partner, that may or may not be. If I tell my cousin, it pretty clearly isn't.

Mr. Schultz: Are you ordering us now to give the substance also? We weren't ordered to do that before.

The Court: Yes. I have just revised it because I think it is correct. I think you should tell them who and what, and where and when.

Now what is the government's position?

Mr. Schultz: May we have a week, your Honor?

The Court: A week?

Mr. Schultz: Yes, sir.

The Court: All right. I don't want to hurry you while you make up your mind on this matter, but I will tell you right now that if the government is unwilling to give that information, that is, the names of the persons and the amounts from whom the unreported income was allegedly received on which the criminal prosecution is based; and, second, the names, time, place and substance of any alleged admissions or confessions which will be used at the trial, I will dismiss the indictments.

A week from today.

Mr. Schultz: Thank you, your Honor.

Mr. Silets: Thank you.

Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 101]

TRANSCRIPT OF PROCEEDINGS—March 14, 1966

had in the above-entitled cause before the Honorable Hubert L. Will, one of the judges of said court, in his courtroom in the United States Court House at Chicago, Illinois, on Monday, March 14, 1966, at the hour of 10:00 o'clock a.m.

PRESENT:

Hon. Edward V. Hanrahan, United States Attorney, by Mr. R. G. Schultz and Mr. R. A. Galbraith, Asst. U.S. Attorneys, on behalf of the Government.

Mr. Harvey M. Silets, on behalf of the Defendant.

The Clerk: 65 CR 432, United States of America versus Simmie S. Horwitz, and 65 CR 464, United States of America vs. Simmis S. Horwitz, to set trial.

COLLOQUY

Mr. Schultz: Your Honor, the government has been ordered to answer questions 14 and 25 of the defendant's motion for bill of particulars.

We have, and we would like to file with the Court now, the answer to question 14, which is to give the names and addresses and amounts that each person will testify to if we use a specific item method, and we have set forth that information.

[fol. 102] With regard to Question 25, your Honor, I would like to state that so far the government has produced by motions, through bill of particulars, the government's theory of the case, the government's method of proving the case, the names as we have tendered now of each witness who will testify as to specific items. We also have the amounts and dates paid by each witness. We have told the defendant the records which the government will rely on in presenting its case.

In addition to this, your Honor, we have given the defendant about five pages setting forth each exact understatement of gross income, the amount and the date. We have set forth each one of these. We further told the defendant the acts of his that we are generally relying on in presenting our case.

Your Honor, except for the statements by the defendant, the government has given the defendant its entire case, and he knows each and every thing the government will prove. There will be nothing at trial except for that one exception which we have not already given by way of bill of particulars, and we think the defendant is well informed of the government's case. There will be no surprise at all, and we request the Court to reconsider its ruling on Question 25.

Mr. Silets: Your Honor, I gather from the government's comments that they persist in their refusal to comply with this Court's direct and specific order on several occasions to furnish the particulars with respect to request No. 25, and therefore I renew my motion. I have submitted to this Court a draft order which incorporates the act of the government furnishing in open court their answers to re-
[fol. 103] quest No. 14, and I ask the Court to dismiss the indictments.

Might I say this, your Honor, that if it were anybody but the United States who would stand before this Court and say I will not comply with your order that more drastic action might be taken with respect to such indifference than what the defendant here seeks.

I suggest, your Honor, that the appropriate action by this Court in response to the government's persistent and flagrant refusal, I might add, is to dismiss the indictments.

The Court: Let me understand you, Mr. Schultz. You say that you are not prepared to tell the defendants on what occasions, that is, time and place and person present, they are alleged to have made incriminating admissions which will be the subject of testimony at the trial. Is that correct?

Mr. Schultz: Your Honor, that is only part of the question. The question asks for more than incriminating admissions. It says "all oral statements" of the defendant which would include incriminating admissions or confessions, whatever it might be.

The Court: I take it that oral statements about the weather are of no interest to you. It is only oral statements which are incriminating that you are interested in. That is what we are talking about.

Mr. Schultz: Your Honor, material—

The Court: I take it the defendant is not interested in being told when he had social chit-chats with people. They are interested in conversations which will be the subject of testimony which will presumably be adverse testimony from the defendant's point of view. Right?

Mr. Schultz: Yes, your Honor.

[fol. 104] The Court: It is limited to that, I take it.

Mr. Silets: Material to the proceedings.

The Court: You are talking about oral statements which are material to the proceedings.

Mr. Silets: Yes.

Mr. Schultz: I am merely suggesting, your Honor, there might be an oral statement which is material but not necessarily an admission.

The Court: We broadened that, I agree, though I think that those are the unlikely rather than the likely statements.

Mr. Schultz: Yes, your Honor.

The Court: If I understand you correctly, you are unwilling to advise the defendant—and I have not ordered you to tell them the substance of the statements. I have simply ordered you to tell who was present, what time the statements were made and where they were made.

Mr. Schultz: The order, your Honor, is to give the substance as well.

The Court: I have said I would not require that.

Mr. Silets: No, sir. You amended that order last week in an exchange of the same sort.

The Court: And excluded these.

Mr. Silets: No, you included these last week. This was the same kind of exchange, and your Honor said we were entitled to that sort of material.

The Court: I don't think there is any question that you are entitled to statements made to government agents. There is no question about that at all. Statements made to third parties, I don't think you are entitled to those. This is the difference between them, as I see it.

Mr. Schultz: Your Honor, we will be prepared to give them statements made to government agents.

[fol. 105] The Court: You have already given them statements made to government agents?

Mr. Schultz: No, your Honor. That is included in Question 25, all statements, the question requests, and we have given no answer at all to that question.

The Court: You are not going to give the statements made to government agents either?

Mr. Schultz: No, your Honor, I think we will give the statements to the government agents.

The Court: It would be a new rule if you could keep confessions to yourself until the trial.

Mr. Schultz: No. We will give all statements, if I understand it, your Honor, in the form of admissions made to government agents.

The Court: All right. So now we are down to the question of statements made to nongovernment agents which the government intends to use at the trial.

Right?

Mr. Schultz: Yes, sir.

The Court: Suppose I am the defendant and I have to defend against this testimony. I don't know until the trial where the statements allegedly were made, by whom they were made, what time of day or night they were made.

If I want to get somebody else in who was present at that conversation, I have to do so at the last minute, after I have heard the testimony, and try to run around and find out where any other persons who were present might be at that time. Or, let's suppose that I want to establish that I wasn't there, that the conversation never took place, that I was in Florida or Puerto Rico, Wisconsin, California, [fol. 106] Texas, wherever you like. I have to go and get hotel records and other substantiating data.

What am I supposed to do at this stage of the game when the defense asks me, your Honor, would you postpone the trial, please, while we now start to run around because this is the first time the identity of the person to whom the statement was made, the time at which the statement was made, the place at which the statement was made has been brought to our attention. The government has clutched this to its bosom until this moment. Now we know for the first time. We require some time to defend against this.

What do I do then? Recess the trial while they go chasing telephone or hotel records, or persons who were also

present at the conversation who can testify whether or not the government witness has stated accurately the subject of discussion?

Otherwise we end up with the defendant saying no, I didn't say that, and the government witness saying, yes, and there being a third witness, fourth witness or fifth witness who can say that isn't what was said; or the defendant says I wasn't in Chicago that day, and the government witness says this is what happened, you were here, this is what was said. Now we have to wait to see if they can secure any evidence indicating that they weren't in fact in Chicago on that day.

I don't quite understand. What benefit is the government going to get out of refusing to disclose the identity of a person, other than a government agent because you are going to give them those statements. We are talking about a nongovernment agent.

Mr. Schultz: Yes, your Honor.

[fol. 107] The Court: Is there any suggestion that Mr. Silets or his client are going to effect a change in the nongovernment agent's testimony about these conversations because they know who he was and where the conversation took place and when it took place or what time of day or night?

Mr. Schultz: Yes, your Honor. I would think that in all criminal proceedings where the defendant's life and liberty are in jeopardy, there would be the propensity to attempt—

The Court: Mr. Schultz, this is not a capital case. The defendant's life is in no sense in jeopardy.

Mr. Schultz: Precisely. That is why in capital cases this information is given, and it is not given in other cases.

The Court: Mr. Schultz, there is nothing in the books which says that you don't have to give it in this case. It simply says you do have to give it clearly in a capital case, and as a matter of fact in a capital case you have to do more than that. In a capital case you have to give the name of every witness. I am not asking you to give the name of every witness:

For example, let's take these conversations. You may have some surveilling witnesses who were standing off at a distance and saw these two people converse at this time. They don't know what was said, but they can testify that there was such a conversation which will corroborate the testimony of the witness who says not only there was such a conversation, but this is what was said at it. Just as we have surveilling witnesses in narcotics cases. This is not different, in my judgment, than the relationship between the witness who is the undercover agent or the special informant or special employee in the narcotics case who makes the transaction, and two or three narcotics agents [fol. 108] are standing at some distance surveilling the transaction.

I am not asking you to give the names of all your witnesses by a long shot, but I am saying to you that if this is an essential element of the government's case, that is, that a conversation took place at a particular time and that something was said in that conversation, just like a transaction took place at a particular time and something was sold and bought in that transaction, then it seems to me you have the duty to tell the defendant where that transaction or where that conversation took place, what time of day or night and what day of the week and month it was and who was present, not surveilling, but actually participating in the transaction, who can testify as to what was bought or sold or testify as to what was said by one or another party to the conversation.

I cannot for the life of me see how you can justify refusing to give that information, and I can tell you now that if the government persists in that refusal, I am simply going to dismiss the indictment.

Mr. Schultz: Your Honor, may I make, or attempt to make, one distinction here. You are comparing this case with a bank robbery or narcotics buy—

The Court: I am not comparing it with a bank robbery. I was comparing it with a narcotics case. All right, take a bank robbery.

Mr. Schultz: A bank robbery where we might have a witness to the actual crime itself. In this case we are not talking about that at all.

The Court: No. No, I am not talking about a witness to the crime itself, Mr. Schultz. I am not talking about somebody who was in the bank and saw the robbery. I am [fol. 109] talking about somebody who was a robber or was a participant in the transaction, the teller on the other side. I am talking now about a person who was not an observer. I am talking about a person who was a principal in the transaction.

We are talking here about somebody to whom a statement was made by a defendant, from whom something was purchased by the defendant, to make the narcotics analogy. Not a bank robbery situation where you have a witness in the nature of a surveilling witness who observed what took place at a distance. I am talking about somebody who participated in it. It is not the same thing at all. Let's talk about a narcotics situation. That is a reasonable analogy.

The Supreme Court has required you to give the name of the undercover or special employee. A case went from this court to the Supreme Court—

Mr. Silets: The Roviaro case.

The Court: (Continuing)—with the holding that you had to disclose the identity of the special employee. Now you are talking about a person who had a conversation in which incriminating statements were presumably made which are going to be testified to, which are going to be used as evidence of the commission of a crime, and you say you are not going to tell them who the person was to whom these statements were made.

Mr. Schultz: And who was present and where they were made.

The Court: And who was present and where they were made and what time of day or night.

Mr. Silets: We renew our Motion, your Honor. I think the appropriate action is to dismiss the indictments. The [fol. 110] government has made it as clear as possible as to their position.

The Court: Is this the government's position?

Mr. Schultz: Yes, your Honor. It has to be, your Honor. We feel that it is beyond the Rules of the Criminal Procedure to give the names of witnesses who will testify to admissions or statements.

The Court: You keep talking about the names of witnesses. I keep telling you that these may or may not be witnesses. You tell me you are giving them a whole bunch of witnesses. I don't know whether these people from whom income was received which you allege was not reported are going to be witnesses or not. I don't know whether the person with whom the conversation was held is going to be a witness or not, or whether all the persons—you may have three or four people present and you may be only going to call one. They are entitled to see what the others might say to see whether they would give different testimony.

Let's suppose you have three people who were present at the conversation beside the defendant, and you call one of them. They don't even know the names of the other two until at the time of the trial. Now they have got to run around and see what those other two would testify to because you are not going to call them. You are not going to call them. My guess is that you are not going to call them because their testimony wouldn't be helpful, otherwise you would call them.

Mr. Schultz: If we were to represent to the Court that if there were any additional witnesses present we would have them available to the defendant at the time of the trial—

[fol. 111] The Court: Mr. Schultz, what is this great love of secrecy which you have in this situation? What psychic—almost psychotic, I started to say—satisfaction do you get out of refusing to disclose to the defendant the names of people who were present at a time in which they are alleged to have either violated the law, because I get the same resistance in narcotic cases, you know. I am told the same thing: this is giving our witnesses. The Supreme

Court finally cleared that up so there isn't any argument about it. Here at a time when an allegedly incriminatory admission was made which is going to be used—and let me say to you that an incriminating admission is just as devastating testimony as the testimony of the actual transaction itself. In some respects it is more devastating because the jury doesn't have to draw conclusions as to whether there was intent, whether the act was performed, because here in one neat little package the defendant has put the question of the act and intent and ended up admitting his guilt.

Now that is a much more devastating piece of testimony, so far as the defense is concerned, than the testimony of a special employee who handed across some money and got in exchange for it some narcotics because you can work on that cross examination with respect to what the circumstances were, whether it was entrapment, whether it was a whole lot of things.

An incriminating admission, a confession made to a third party, is the most devastating kind of evidence from the point of view of the defense. But you are not going to even tell them so they can prepare a reasonable alibi if he wasn't there or get other witnesses who were there. In other words, I cannot see what harm—I don't understand [fol. 112] what harm could come to your case from the disclosure to the defense of who was present. Not what was said because I have said to you that with respect to what was said, I am not going to order that where it is a third party. Where it is a statement to a government employee, yes, I will, but not where it is a third party.

Mr. Schultz: Your Honor, as we have stated in our briefs, as we have attempted to persuade you in oral argument—

The Court: All right.

Mr. Schultz: (Continuing)—it is not required in a criminal action for the government to give the witnesses, or the possible potential witnesses who will testify as to admissions made by the defendant. I think the reason for the rule is the government has no means of discovery. The

defense has all the means of discovery. The defendant has learned of the government's case. The government does not know the defendant's case. The defendant has the opportunity now to manipulate, the opportunity—and I am not assuming counsel would.

The Court: He also is presumed to be innocent; the government has the burden of proving his guilt beyond a reasonable doubt; there is no confession which can be used unless it is voluntary; and a whole host of things.

Mr. Silets: There is also this. Mr. Schultz is alluding, and I don't want the record to be unclear about it, that there is a possibility that this defendant and/or his counsel may manipulate evidence. If that is the case, the F.B.I., the United States Department of Justice and the United States Attorney's office have a great number of resources to prosecute.

[fol. 113] The Court: Mr. Silets, I cannot conceive of your clients in this case being so unwise or you being so unwise as to permit them to become involved in a much more serious crime.

Mr. Silets: Precisely.

The Court: Subornation of perjury or something of that sort, a much more serious crime than the crime they are charged with in this indictment, so the idea that the defendant would expose himself to a charge of tampering with a government witness is to me, in the absence of some kind of showing, just beyond belief. I cannot believe that the governments testimony is going to be changed one iota by disclosing this information.

I think the defendant's ability to meet it may be vastly different, depending on whether or not they have this information, but I think they are entitled to have this information. They are entitled to try to get the truth before the jury, get the truth before the Court.

All right. You are not going to give the information?

Mr. Schultz: Your Honor, I just did want to repeat, first, that I wasn't suggesting at all that Mr. Silets would do a thing of this sort. Secondly, I would repeat that if

the Court required the government to, we would have any witnesses present in court, or at least available, who heard the admissions or the confessions or were present at the time so that the defense wouldn't be caught without being able to secure these witnesses. We will have them in court, your Honor.

The Court: Suppose in fact the defense's position is that I wasn't in town that week, that day, or that month, and I have to establish this by testimony of everything from hotel registers to people in New York or in Florida or [fol. 114] someplace else who can testify I was there and not in Chicago at the time that conversation took place.

Mr. Schultz: There is that possibility, your Honor.

The Court: Of course, and it doesn't give an opportunity to interview the witnesses before the trial either. Why shouldn't they have an opportunity to interview the witnesses? Why should they put them on cold at the time, or why should I have to recess then while they go and interview the witnesses to see what their testimony would be?

I don't understand it, Mr. Schultz. I just don't understand in this situation—I can understand a lot of situations, but in this situation. We are not talking about some other case, but in this case, this case in which you say that there were incriminating admissions made.

Or, the alternative, Mr. Silets, I am not sure. I said I was going to dismiss this indictment, but I have a couple of other alternatives, it seems to me. One is simply to preclude any testimony of that kind being received at the trial in the absence of a refusal to disclose it in advance, which is one device available to me. Second is to give them a chance to let the Court of Appeals review this and see whether I am right or wrong before dismissing the indictment.

Mr. Schultz: Your Honor, the government does intend or does anticipate having the Court of Appeals review this.

The Court: All right. Now, the only question, for my money I don't think you are entitled to a free ride on this. I have been thinking about this. I don't think you are

entitled to have Mr. Silets' client pay the cost of appeal, et cetera, and then if you lose, then come back and say, now we will try the case, giving them the information.

[fol. 115] For my money, you ought to take this calculated risk. If you want to stand on your refusal, which seems to me to be purely arbitrary and unreasonable in this situation, then I think you ought to run the risk that in the event that you lose, that the Court of Appeals says, you know, Judge Will was right, this is reasonable information to disclose to the defendant in this situation; then you ought not to come back and say, okay, now we will disclose the information.

Mr. Silets: I don't think they can.

The Court: They can.

Mr. Schultz: If the Court of Appeals stays the order.

The Court: If the Court of Appeals stays the order of dismissal, they can.

Mr. Schultz: Your Honor, in the interest of justice, we think that if the government is wrong in this case, then the information should be supplied and the defendant should be tried.

The Court: Mr. Schultz, how long do you want? Two years from now, after they get through with the Supreme Court of the United States, because I know if the Court of Appeals says I am right and you are wrong, you will end up in the Supreme Court or try to get there on a petition for writ of certiorari, and if they lose in the Court of Appeals, they will go to the Supreme Court once they have this bear by the tail. Two or three years from now, assuming that the Supreme Court says that is right, you give them the information, then you are prepared to try the case on the basis of which I say now is reasonable that you should try the case.

No, I think they are entitled at that stage of the game having gone all the way as far as you can go in this matter [fol. 116] not to have to stand trial thereafter. I just don't think the government is entitled to have its cake and eat it too. That is what you are asking for.

Mr. Schultz: Your Honor, this is a bill of particulars propounded by the defendant. He is requesting something which is rather extraordinary, perhaps, and if the government is wrong—

The Court: Mr. Schultz, you keep talking as though this was something rather extraordinary. To me it is no different than the same kind of information that I have talked about earlier, which we require you to produce in case after case, and which the Supreme Court has now said you produce, even though the government took the same position, I would remind you, precisely the same position on the narcotics situation as you are taking here on the informant situation, and the two are substantially the same kind of people. They are people who are not government employees, who do a special job in a special situation and get paid for it. There is a great deal of analogy between the special employee in the narcotics case and the informant in this kind of case, and I assume we are talking about an informant—

Mr. Schultz: Not necessarily.

The Court: We are talking about a nongovernmental employee to whom incriminating admissions were made. That is an informant by definition, isn't it?

Mr. Galbraith: I don't think it is necessarily, your Honor. It could possibly—

The Court: You have the information.

Mr. Schultz: Yes, your Honor, in that sense it is.

The Court: Of course it is an informant. It is not somebody Mr. Silets knows his client made an admission [fol. 117] to. It is somebody you know his client made an admission to.

Mr. Schultz: Mr. Silets may know this, your Honor. We have no way of telling that.

Mr. Silets: If I knew, I wouldn't ask.

Mr. Schultz: That is not necessarily so. He has asked us to reproduce almost all the books of the corporation.

The Court: He might know or might not know. I think he is entitled not to have to guess. I think you are not

entitled to a free ride all the way to the Supreme Court and then back, and try the case on the same basis that I have told you to try it now.

If you win and I am wrong, fine, then Mr. Silets is going to have to try the case on the basis of not knowing and guessing. If you lose, however, I think you ought to have something at stake. You have got nothing at stake unless I dismiss this case.

Mr. Schultz: May we ask your Honor to reserve your ruling until this afternoon so that we might attempt to get a staying order, your Honor?

Mr. Silets: I would object to that, your Honor. I think the Court should enter its order now. If the Court of Appeals feels it should be stayed—

Mr. Schultz: It can't be stayed once it is entered.

Mr. Silets: Precisely. That is why I say, if the Court enters its order now dismissing the indictment—

The Court: At that point, Mr. Silets, they are hung with it and the Court of Appeals can't do anything about it except take the case one way or the other.

Mr. Silets: That is right, and we are willing to take the chance in the Court of Appeals that your Honor is right.

[fol. 118] Mr. Schultz: They are not taking any chance at all. The government is sacrificing a great deal in a case of this nature wherein we are possibly allowing a defendant—

The Court: Mr. Schultz, I don't know what you are talking about taking a chance. They are taking the chance that they will be spending the next two years litigating the question of whether or not you should have given them the information, which it seems to me patently reasonably you should have, and this will cost them some money at least, and they can end up still having to try the case.

Mr. Silets: We are willing to take that chance.

The Court: They are taking a chance.

Mr. Schultz: The longer it takes for the case to be tried, certainly the more difficult it is for the government to present its case. Certainly the more advantageous—

The Court: In this type of case that is not necessarily so. This is a bookkeeping case essentially.

Mr. Galbraith: Not necessarily, your Honor.

The Court: The books and records are not going to change very much. You are talking about unreported income and you have given them a tabulation, which I take it is immutable, of transactions—

Mr. Schultz: We have given them further tabulations than that, your Honor. We have given them about twenty pages of tabulations.

The Court: That is not going to change with the passage of time. What is going to change in the passage of time is the availability of live witnesses, who may be as important to the defense as to the government. I don't see that there is any advantage in this kind of a case from the defense point of view in delay. I will say in nine cases [fol. 119] out of ten delay works for the benefit of the defense, but I don't think it does necessarily in this case. I think in this case it could work either way.

Mr. Schultz: There is that possibility, of course.

Mr. Silets: Your Honor, I have submitted a draft order to both the Court and to counsel.

The Court: No, the draft order won't do because it says more than I intended to say. It talks about 25 in toto, and I am not going to require, for example, 25(d) to be given with respect to nongovernmental agents.

Mr. Silets: Might I suggest that your Honor enter a minute order then so we don't get into a bind with the Court of Appeals.

The Court: Mr. Silets, I am not going to foreclose the Court of Appeals from a chance to look at it. That doesn't seem to me to be fair at this stage.

Mr. Silets: They are going to file an appeal or mandamus against your Honor's order, and it will be reviewed in any event.

The Court: No, I am talking about the question of whether or not they should be required to go for broke on this, so to speak. I think they should. I will have this

written up so that the Court of Appeals judge can have it, and I think he should have it, and if there is any question about the information being available to the Court of Appeals in the form in which, it seems to me, they ought to consider it, I want to be sure that it doesn't come in the form in which you present it this morning, which I don't conceive to be an accurate statement of the dynamics and logistics of the situation.

Mr. Silets: Your Honor, I concur with the Court and [fol. 120] say, to use the Court's language, that they should go for broke, and I think the Court should enter its order and let the Court of Appeals review that order rather than to have this reviewed on a stay.

The Court: Mr. Silets, I don't want to prejudice the ultimate result on the question of the disclosure or non-disclosure of this information by having precluded the Court of Appeals from an opportunity of preserving the status quo if they think that is appropriate, so that the issue of whether or not this kind of information should be disclosed can be decided without regard to whether it means dismissal of the case or continuation of the case. I think they should go for broke. I have made that clear. I don't think they should have a free ride, and at the same time take you all the way to the Supreme Court. But I don't want the Court of Appeals to feel that it is in any way limited to its consideration of the case by the fact that the motion to dismiss has been granted, and therefore the only way they can get around that is to reverse on the question of the disclosure of this information. I want that question, if possible, decided.

Now if they agree that the government should go for broke, as I think they should, then they have only to refuse to issue a stay order. I will enter the order to dismiss this afternoon or tomorrow morning, and then we will have set the thing in perspective, so that the Court of Appeals cannot justifiably be impelled to reverse simply to get the case reinstated.

They will have had a chance to look at it and decide whether they think this is a relevant factor or not. I think that is sensible.

[fol. 121] Mr. Silets: May I suggest that the Court set two o'clock for entry of the order unless there has been a stay granted prior to that time?

The Court: I want to get this written up so that they have the benefit of it. I will set this tomorrow morning at ten.

Mr. Schultz: Thank you.

Mr. Silets: Might I suggest in consideration of the proposed order that your Honor give attention to the findings that I have suggested in the order?

The Court: Yes, obviously I will make some findings. In effect, I have made some orally from the bench this morning.

Mr. Silets: Thank you, your Honor.

Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 122]

CLERK'S NOTE

Memorandum Opinion dated and filed December 7, 1965 is omitted from the record here. It appears on pages 58-60 supra.

[fol. 125]

MOTION FOR ENTRY OF AN ORDER DIRECTING THE GOVERNMENT TO FURNISH PARTICULARS, OR, IN THE ALTERNATIVE, TO DISMISS INDICTMENTS—January 4, 1966

Now Comes the Defendant, Simmie S. Horwitz, by and through his attorneys, Harris, Burman and Silets, and respectfully moves this Court for the entry of an Order directing the United States of America to comply with the Order and Opinion of this Court entered November 29, 1965, and filed December 7, 1965, respectively, directing the Plaintiff to furnish a Bill of Particulars and, in support thereof, states as follows:

1. The Defendant filed his Motion for a Bill of Particulars on September 7, 1965, requesting some thirty particulars with respect to the captioned Indictments. On [fol. 126] November 29, 1965, this Court entered its Order granting Defendant's request, except as to particulars No. 4 and 29(b).

2. On December 3, 1965, the United States of America filed its Motion to vacate the Order of November 29, 1965, and grant leave to the Government to file a Memorandum in support of its Motion. Upon a full statement by the Government of its position, the Court took the matter under advisement.

3. On December 7, 1965, this Court filed its Memorandum Opinion denying the Government's Motion to vacate the Court's Order of November 29, 1965, with the exception of Request No. 25(d).

4. Though a reasonable period of time for the compliance with this Court's Order has elapsed, the Government has, to date, failed to comply with the Court's Order of November 29, 1965, and has completely failed to respond and give particulars with respect to Requests No. 14, 25, 28, and 29(a).

5. Further, the Government has failed to give sufficient particulars to constitute an adequate response to Requests No. 7, 11, 13, 16, and 24.

6. Further, with respect to Request No. 10 the Government has failed to specify which documents were obtained from corporate officers and Agents, and the specific dates so obtained.

Wherefore, the Defendant moves that this Court enter its Order directing the United States of America to furnish particulars with respect to Requests No. 14, 25, 28, and 29(a), as well as further particulars with respect to Requests No. 7, 11, 13, 16, and 24, within fifteen (15) days, [fol. 127] or, in the alternative, if the United States fails

to furnish the said particulars, that this Court enter its Order dismissing the Indictments.

Respectfully submitted,

....., Attorneys for Simmie S. Horwitz.

Certificate of Mailing (omitted in printing).

MOTION TO DISMISS INDICTMENTS—Filed January 4, 1966

Now Comes the Defendant, Simmie S. Horwitz, by and through his attorneys, Harris, Burman and Silets, and respectfully moves this Court for the entry of an Order dismissing the captioned Indictments and, in support thereof, states as follows:

1. The Government has declined to furnish Particulars No. 14, 25, and 29, which it had been ordered to furnish by this Court's Orders of November 29, 1965 and December 7, 1965.

2. This cause having come on to be heard at 10:00 A.M. on January 4, 1966, the Government again specifically declined to comply with this Court's previous Orders. The [fol. 128] Defendant thereupon made his Motion to dismiss the Indictments, and the Court denied the said Motion indicating it had no authority to do so. This Court in lieu thereof, in light of the Government's refusal, continued the matter indefinitely.

3. The Defendant respectfully represents to the Court that, in the face of a specific refusal of the United States to comply with the pre-trial Order to furnish particulars, the United States Supreme Court has indicated the District Court has the jurisdiction to dismiss the Indictments. Thus, in *Roviaro* v. *United States,* 353 U.S. 53, 1 L.Ed. 2nd 639, an Appeal from a conviction arising from this District Court, the United States Supreme Court had occasion to

review the alternatives available to the District Court when the Government declined to furnish the name and address of an informant. After holding that in the particular facts the name and address of the informant was important and relevant, the Court stated at page 64:

> "* * * However, we think that the Court erred also in denying, prior to the trial, Petitioner's Motion for Bill of Particulars, insofar as it requested John Doe's identity and address. Since Count 1 was then before the Court and expressly charged Petitioner with a sale of heroin to John Doe, it was evident from the face of the Indictment that Doe was a participant in and a material witness to that sale. *Accordingly, when his name and address were thus requested, the Government should have been required to supply that information or suffer dismissal of that Count.*" (emphasis supplied).

Similarly, in the case of *Jencks* v. *United States*, 353 U.S. 657, 672 (1957), the United States Supreme Court reviewed the possibilities when the Government refused (at a time when there was no specific statute relating to the issue) to [fol. 129] permit the Defendant to inspect certain statements or reports in the possession of the Government. It held that the criminal action must be dismissed, stating:

> "We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of Government witnesses touching the subject matter of their testimony at the trial."

4. The Defendant cannot be held to await indefinitely the pleasure of the Government in the face of its blatant and unmitigated refusal to comply with this Court's Orders. The effect of this Court's direction to continue the

matter indefinitely is to permit the Government to affect a long delay of prosecution which hangs like the sword of Damocles over the Defendant, in violation of his rights under the Sixth Amendment to the Constitution of the United States to a speedy trial.

Wherefore, the Defendant prays for the entry of an Order dismissing the Indictments on the grounds set forth above, or, in the alternative, on the grounds that the Government has denied to the Defendant a speedy trial, pursuant to his rights granted under the Sixth Amendment to the Constitution of the United States.

Respectfully submitted,

....., Attorneys for Simmie S. Horwitz.

[fol. 130]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before Hon. Elmer J. Schnackenberg, Circuit Judge, Hon. Win G. Knoch, Circuit Judge, Hon. Roger J. Kiley, Circuit Judge.

No. 15607

UNITED STATES OF AMERICA, Petitioner,

vs.

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois, Respondent.

ORDER DENYING PETITION FOR WRIT OF MANDAMUS—
July 12, 1966

This is a petition by the government for writ of mandamus to compel respondent, a district court judge, to vacate his order which effectually directs the government

in a criminal cause to give the defendant names and addresses of persons to whom defendant in said cause made oral statements to support the charges in the indictments. Briefs have been filed in this court by both parties. The court has considered the briefs and is fully informed of the points made and the positions of the parties with respect to the issue, and

The court finds that the order subject of the petition is not an appealable order, and a review of it would offend the policy against piecemeal appeals in criminal cases, *Cobbledick* v. *United States,* 309 U.S. 323; that mandamus may not be used as a means of reviewing the non-appealable order, *Roche* v. *Evaporated Milk Association,* 319 U.S. 21; that federal courts use mandamus for the traditional purpose of confining a district court to a lawful exercise of its jurisdiction or to compel it to exercise its proper juris- [fol. 131] diction, *Roche* v. *Evaporated Milk Association;* that the district judge's order upon the government to furnish names and addresses of witnesses to a defendant may be erroneous, a question we do not decide, but the ruling itself was within the court's jurisdiction, *Roche* v. *Evaporated Milk Association;* that the ruling can be reviewed on appeal from a final judgment; and that there is no question here that the district judge refused to exercise his proper jurisdiction.

It Is Therefore Ordered that the petition for writ of mandamus be and it is hereby denied.

[fol. 132]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before Hon. Elmer J. Schnackenberg, Circuit Judge, Hon. Win G. Knoch, Circuit Judge, Hon. Roger J. Kiley, Circuit Judge.

[Title omitted]

ORDER—August 16, 1966

This cause came on to be heard upon the government's Petition For Reconsideration of the Order of July 12, 1966, and for a hearing on the merits, and upon the opposition of respondent to the granting of the petition; and the court being fully advised has reconsidered its order of July 12, 1966:

The court finds that in the circumstances of this particular case the court should consider the merits of the ruling of the district court challenged by the government, rather than to remit the government to a radical alternative appealable judgment available to the trial judge upon the government's persistent refusal to comply;

It is therefore ordered that the order of this court of July 12, 1966, be and it is hereby vacated, and the cause is taken by the court upon the petition for the writ, the briefs of both parties and the record.

[fol. 133]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before Hon. Elmer J. Schnackenberg, Circuit Judge, Hon. Win G. Knoch, Circuit Judge, Hon. Roger J. Kiley, Circuit Judge.

[Title omitted]

ORDER DIRECTING THAT WRIT OF MANDAMUS ISSUE—October 4, 1966

This cause came on to be heard upon the Government's petition for writ of mandamus ordering respondent to vacate his order directing the Government to answer question 25 in defendant's motion for bill of particulars, which question sought, among other things, the names and addresses of persons to whom defendant made oral statements supporting the indictment charging wilful evasion of income tax, and which statements the Government would rely upon at the trial; upon the rule issued upon respondent to show cause why the writ should not issue; upon the brief of respondent answering the rule, and the brief of the Government; and upon the record.

And the Court having on August 16, 1966 vacated its July 12, 1966 order denying the writ, and having reconsidered the question,

It Is Ordered that a writ of mandamus issue as prayed in the Government's petition directing respondent to vacate his order directing the Government to answer question 25 in defendant's motion for bill of particulars.

[fol. 134]

Respondent's Petition for Rehearing En Banc covering 8 pages filed October 19, 1966 omitted from this print. It was denied, and nothing more by order. December 5, 1966.

[fol. 135]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before Hon. John S. Hastings, Chief Judge, Hon. Elmer J. Schnackenberg, Circuit Judge, Hon. Win G. Knoch, Circuit Judge, Hon. Latham Castle, Circuit Judge, Hon. Roger J. Kiley, Circuit Judge, Hon. Luther M. Swygert, Circuit Judge, Hon. Thomas E. Fairchild, Circuit Judge, Hon. Walter J. Cummings, Jr., Circuit Judge.

[Title omitted]

ORDER DENYING PETITION FOR A REHEARING EN BANC—
December 5, 1966

It Is Ordered by the Court that the petition for a rehearing *en banc* of this cause be, and the same is hereby Denied.

(Cummings, C.J. voted to grant petition for rehearing en banc)

[fol. 136] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 137]

SUPREME COURT OF THE UNITED STATES

No. 918—October Term, 1966

HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois, Petitioner,

v.

UNITED STATES.

ORDER ALLOWING CERTIORARI—March 13, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.